No. 00-1028-CSY Title: Ohio, Petitioner
v.
Matthew Reiner

Docketed: December 26, 2000 Court: Supreme Court of Ohio

Entry	Date	Proceedings and Orders
	Dec 19 2000	Petition for writ of certiorari filed. (Response due January 25, 2001)
	Dec 19 2000	Appendix of petitioner filed.
	Jan 25 2001	Brief of respondent Matthew Reiner in opposition filed.
	Feb 7 2001	DISTRIBUTED for Conference of February 23, 2001
	Feb 15 2001	Reply brief of petitioner Ohio filed.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A father is prosecuted in the "shaken-baby" death of his ten-week-old son. The State of Ohio seeks the testimony of the baby's nanny, who, on advice of counsel, agrees to testify only on the condition that she be granted immunity from prosecution. Witnesses may invoke their Fifth Amendment rights against self-incrimination unless it is "perfectly clear" that the questions "cannot possibly have a tendency to incriminate." As the baby's full-time, on-site, exclusive daytime caretaker, does such questioning potentially jeopardize her Fifth Amendment rights?

PARTIES TO THE PROCEEDING

The following entities and individuals are parties in the court below:

The State of Ohio, by Julia R. Bates, Lucas County Prosecuting Attorney; Matthew Reiner, as the defendant.

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State v. Reiner, 90 Ohio St.3d 1419, 735 N.E. 2d 457 (2000)

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Ohio, respectfully requests that a writ of certiorari be issued in this case. The Petitioner successfully prosecuted defendant for Involuntary Manslaughter. The Supreme Court of Ohio ultimately reversed this conviction, finding that a key State witness was improperly granted immunity from prosecution to compel her testimony. Unusual as it may be for the Government to champion the Fifth Amendment privilege against self-incrimination, Petitioner seeks this Court's review of this improper ruling that, if permitted to stand, will result in an unprecedented narrowing of a witness's privilege against self-incrimination and will stymie any future prosecutions relying on the immunized testimony of key witnesses.

JURISDICTION

The Supreme Court of Ohio issued its opinion on July 26, 2000. The petitioner filed a Motion for Reconsideration, which the court denied on September 20, 2000.

Under Rules 13.3 and 29 of the Rules of the United States Supreme Court, this Petition for Writ of Certiorari was timely filed on or before December 19, 2000. This Court's jurisdiction is invoked under 28 U.S.C. Secs. 1254(1) and 2106.

OPINION BELOW

This petition seeks review of the Supreme Court of Ohio's decision in *State v. Reiner,* 89 Ohio St.3d 342, 731 N.E.2d 662 (2000), filed July 26, 2000. See App., *infra,* 1-36. The Supreme Court of Ohio's decision reversed the unpublished decision of Ohio's Sixth District Court of

Appeals, *State v. Reiner*, No. L-97-1002 (Ohio Sixth District Court of Appeals, Dec. 18, 1998), App., *infra*, 37-70. After the Ohio Supreme Court's ruling, petitioner filed a motion with that tribunal asking it to reconsider aspects of its ruling. In a 5-2 ruling, the Court denied the motion. That decision, dated September 20, 2000, is reported at 90 Ohio St.3d 1419, 735 N.E.2d 457 (2000). See App., *infra*, 71.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States
Amendment V:

> No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service at time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Alex Reiner died on August 30, 1995. He was ten weeks old. The cause of death was "shaken baby syndrome." There were only three suspects: his mother, his father, and the nanny. Because the evidence established that the father, Matthew Reiner ("defendant"), was with the child

when he collapsed, and because the State of Ohio's medical experts concluded that the injuries which caused his death were inflicted shortly before he collapsed, defendant was charged with Involuntary Manslaughter.

At trial, the defense claimed that Susan Batt, the nanny, was the person responsible for Alex's death. The day before Ms. Batt was called to testify, Lorin Zaner, the attorney for Ms. Batt informed the court that although the State had advised him that his client was not the focus of the investigation, he had been advised by defense counsel that they believed she was the responsible party. App., *infra*, 113. Since the defense refused to disclose its witnesses,[1] he refused to allow his client to testify absent a grant of immunity. App., *infra*, 113.

Defense counsel acknowledged that Mr. Zaner's characterization of the defense was accurate, that Ms. Batt was their target. App., *infra*, 115. The State advised the court that it had no evidence to indicate that Ms. Batt was the guilty party and that it had no intention of prosecuting her. App., *infra*, 114. Nonetheless, since her testimony was vital, the State requested the court to grant immunity to her in view of the defense claims.[2]

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1 Before trial, defense counsel never requested discovery from the State. Consequently, under Ohio law, the defense could not be compelled to provide iscovery to the State, nor did it do so voluntarily. No defense witnesses had been identified.

2 The trial court granted this request under Ohio Rev. Code Ann. Sec. 2945.44, App., *infra*, 72-73, which provides in relevant part:

> (A) In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall

Before granting immunity, the court conducted a further hearing the next morning. App., *infra*, 127-162. At that hearing, the State objected to any defense input on the issue of the court granting immunity because the defense had no standing to raise the issue. App., *infra*, 134-135. Despite the objection, the court listened to two legal representatives: one was Joseph Thacker, an attorney representing Alex's mother, App., *infra*, 140-150; the other was Laura Wagner, the guardian *ad litem* for the Reiner children, App., *infra*, at 151-153. Mr. Thacker recited a list of injuries Alex sustained during the two weeks prior to the fatal injury as well as injuries to Alex's twin brother during the same time frame. App., *infra*, 141-142. Since Ms. Batt had been alone with those children for forty hours a week, Mr. Thacker argued that it was not "in the interest of anyone to shield this woman from prosecution when the evidence will establish that after she had ... entered this home this pattern of abuse

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compel the witness to answer or produce the information, if both of the following apply:

(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;
(2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he gave an answer or produced any information.

began and prior to her entry into this home there was no abuse." App., *infra*, at. 149.

The guardian *ad litem* went even further. She advised the court that there was "a plethora of evidence on the record in Juvenile Court ... which points to Susan Batt," App., *infra*, 152, and concluded by saying, "(I)t's the children's position that they would like to see the true killer of their brother presented and brought to justice and that will not happen if Miss Batt is granted immunity," App., *infra*, 153.

Against this backdrop of accusations about Ms. Batt, talk of incriminating evidence, and a steadfast refusal by defense counsel to disclose the identity of their witnesses or their evidence, the trial court found that the privilege against self-incrimination attached and granted the State's request for immunity. App., *infra*, 154-155.

Thereafter, Ms. Batt eventually testified for the State. Her testimony did not incriminate herself or the defendant, but it did provide her account of what transpired during the period she served the Reiners and cared for their children. App., *infra*, 3. Most importantly, her testimony was subject to vigorous, thorough and unlimited cross-examination and impeachment. [3] Despite strenuous defense arguments to the jury that Ms. Batt's testimony provided evidence that established her guilt, defendant was convicted of Involuntary Manslaughter.

The trial court denied a defense motion for a judgment of acquittal or a new trial. App., *infra*, 74-107. Ultimately, the court sentenced defendant to an indefinite period of incarceration of five to twenty-five years. App.,

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3 Relying upon prior refusals of Ms. Batt to testify in ancillary proceedings in Juvenile Court, the defense had hoped a similar refusal at trial would open the door for purported hearsay statements to become available without the perils of cross-examination. App., *infra*, 115-116.

infra, 41. However, this sentence was suspended and defendant was placed on five years probation. *Id.*

Defendant appealed his conviction, advancing nine assignments of error, including claims that the lower court erred by (1) granting immunity to Ms. Batt and (2) not granting his motion for a new trial on the ground of juror misconduct. The Ohio Sixth District Court of Appeals sustained respondent's juror-misconduct argument but overruled his remaining eight arguments and remanded the matter to the trial court. App., *infra*, 37-70.

Petitioner filed a notice of appeal to the Supreme Court of Ohio, seeking the court's review of the appellate court's juror-misconduct ruling. For his part, respondent filed a notice of cross-appeal, seeking the court's review of the appellate court's denial of his other arguments, including its rejection of his immunity argument. The court agreed to review the case and all issues presented.[4]

On July 26, 2000, the Supreme Court of Ohio reversed the appellate court on both the juror-misconduct and the immunity issues. *State v. Reiner,* 89 Ohio St.3d 342, 731 N.E.2d 662 (2000), App., *infra*, 1-36. The ruling was fractured: As to the juror-misconduct question, a 6-1 majority ruled in petitioner's favor, finding that the trial court properly denied respondent's motion for a new trial. Regarding the immunity issue, however, a 5-2 majority ruled in respondent's favor, holding that Ms. Batt did not have a valid Fifth Amendment privilege against self-incrimination and that the trial court improperly granted her immunity.

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4 The Court accepted the case in two separate rulings. First, finding that a conflict existed between two of Ohio's regional appellate districts, it certified a conflict and ordered briefing on the juror-misconduct question. *State v. Reiner*, 86 Ohio St.3d 1417, 711 N.E.2d 1011, App., *infra*, 108-109. The next day, the court it accepted the case by allowing a discretionary appeal. *State v. Reiner*, 86 Ohio St.3d 1418, 711 N.E.2d 1012, App., *infra*, 110.

On September 20, 2000, the Supreme Court of Ohio, by a 5-2 vote, denied petitioner's motion to reconsider its holding as to the immunity issue. *State v. Reiner,* 90 Ohio St.3d 1419, 735 N.E.2d 457, App., *infra*, 71.

Petitioner now seeks this Court's review of the Ohio Supreme Court's decision as to the immunity question.

ARGUMENT

> To sustain the privilege [against self-incrimination], it need only be evident from the implications of the question, ***in the setting in which it is asked***, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (citation omitted) (emphasis added).

At the immunity hearing, the trial court listened to both the guardian *ad litem* and the counsel representing Alex's mother accuse Ms. Batt of killing Alex. These attorneys both recited a list of injuries sustained by both Alex and his twin brother during the same time frame and observed that Ms. Batt, in her capacity as nanny, had been alone with Alex for forty hours a week.

As Chief Justice John Marshall long ago recognized, it is in these very sorts of delicate fact situations in which the Fifth Amendment privilege arises:

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because ***they [sic] cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims.*** It follows necessarily then, from this statement of things, that ***if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.*** If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.

United States v. Burr, 25 F. Cas. 38, 40 (Cir.Ct., D.Va.1807)(emphasis added).

Chief Justice Marshall's statement of the law on this subject was, has been with brief exceptions, and is now the proper statement of the law regarding the subject of self-incrimination under the Fifth Amendment.

In determining whether the privilege attaches, no court has ever required the witness to reveal the information and explain why the witness feels it would be incriminating before granting immunity, no case, that is, until the Supreme Court of Ohio handed down its decision in this case. On the subject of a witness claiming a Fifth Amendment privilege against self-incrimination, the Ohio Supreme Court now stands in a minority of one.

First, the Ohio Supreme Court now all but requires witnesses wishing to invoke their Fifth Amendment privilege to first prove that they, indeed, are entitled to the privilege. Second, it has lost sight of the fact that the privilege against self-incrimination belongs to the witness, not the defendant. And, finally, it mistakenly ruled that the defendant has standing to challenge the granting of immunity to a prosecution witness. These rulings conflict with each and every case, both state and federal, that have reviewed these issues. Therefore, review is appropriate under this Court's Rule 10(b). If allowed to stand, *State v. Reiner*, at least in Ohio, will set Fifth Amendment law on a collision course with itself. The results are far reaching: prosecutions relying on immunized witnesses will be stymied, and, conversely, courts will effectively be able to force witnesses -- grand-jury witnesses and trial witnesses -- to provide self-incriminating testimony -- in criminal and civil cases. And while *Reiner* concededly affects court proceedings only in Ohio, its startling ruling so eviscerates one of our country's

most bedrock principles that it is unacceptable in any American jurisdiction.

REASON TO GRANT THE WRIT

Review Is Warranted Because The Ohio Supreme Court's Ruling That Ms. Batt Had No Fifth Amendment Privilege To Protect Conflicts With Decisions Of This And Every Tribunal Ever To Review The Question

This case warrants this Court's review because it presents significant questions relating to one of our Constitution's most-cherished rights -- the right against self-incrimination. The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Specifically, this case involves the interplay between the government's obligation to prosecute cases zealously using the testimony of third-party witnesses[5] and the right of those third-party witnesses to testify in such

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5 See *Kastigar v. United States*, 406 U.S. 441 (1972), describing immunity statutes as "essential to the enforcement of various criminal statutes." *Id.* at 447. They have "become part of our constitutional fabric." *Id.*, quoting *Ullman v. United States*, 350 U.S. 422, 438 (1956). Immunity is required if there is to be "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 446. See, also, *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983): "[T]he government has a vital interest in assuring the continued and unimpeded flow of information concerning criminal activities, and this interest may be furthered if a witness believes he will not be prosecuted." *Id.* at 289, n.9 (Stevens, J., dissenting)(citation omitted). "Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected; unless compelled over an appropriate claim of privilege." *United States v. Mandujano*, 425 U.S. 564, 576 (1976), citing *United States v. Blue*, 384 U.S. 251, 255 (1966).

cases without jeopardizing their own rights against self-incrimination. This balance involves the "conditional protection of testimonial privacy subject to the basic limits recognized before the framing and refined through immunity doctrine in the intervening years." *United States v. Balsys*, 524 U.S. 666, 692-93 (1998).[6] "The practice of exchanging silence for immunity ... is presumably invulnerable, being apparently as old as the Fifth Amendment itself. *Balsys* at 692, n.13, citing *Kastigar v. United States*, 406 U.S. 441, 445.

Under the Ohio Supreme Court's novel approach, the government will be able to grant immunity to third-party witnesses in only extraordinary circumstances, effectively removing this vital tool from the government's use. Perhaps more significantly, however, the Ohio Supreme Court's ruling bucks two centuries of American legal decisions that have consistently held that (1) the privilege against self-incrimination belongs to the witness, not the defendant, and that (2) once requested, the immunity should be liberally granted and the witness be permitted to testify without fear of prosecution. It is the interplay of these three critical issues -- a witness's right against self-incrimination, the government's ability to effectively use immunity as a tool in prosecuting cases, and a defendant's right to a fair trial -- to say nothing of the Ohio Supreme Court's emasculation of well-established precedent -- that compel this Court's review of this case.

As discussed below, the Fifth Amendment privilege in question belonged to Ms. Batt, not to defendant. Further, because she had a valid Fifth Amendment privilege, she should have been permitted to assert it and be granted

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6 The trial court recognized the importance of this balance: The defendant's rights "must be protected, but so must the State's right to have the witnesses called and [*sic*] according to statute." App., *infra*, 147.

immunity. Finally, a trial court's grant of immunity is reviewable only for an abuse of discretion. These points are addressed in succession.

A. The Privilege Belongs To Ms. Batt, Not To Defendant

The privilege against self-incrimination is "an ancient principle of the law of evidence." *Counselman v. Hitchcock*, 142 U.S. 547, 563-64. The breadth of its protection was established long ago by none other than Chief Justice John Marshall in *United States v. Burr*, 25 F.Cas. 38, in which the court expressly rejected the United States Government's call for a narrow reading:

> The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless.

25 F.Cas. at 40.

In the years following *Burr*, this Court generally adhered to this principle. See, *e.g.*, *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920). But there were exceptions. "During the intervening years from Chief Justice Marshall's decision in Aaron Burr's case ... , the [United States Supreme] Court appears to have departed in

numerous instances from any such broad construction of the privilege." *Ballantyne v. United States*, 237 F.2d 657, 664 n.9 (5th Cir. 1956) (citations omitted).

In *Hoffman v. United States*, 341 U.S. 479 (1956), this Court reined in these straying authorities and reaffirmed Chief Justice Marshall's original broad interpretation of the privilege. "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." 341 U.S. at 486, citing *Counselman* and *Arndstein*.

The privilege belongs to the witness, not the defendant. See *United States v. Burr*, 25 F. Cas. 38, 39:

> It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. For the witness who considers himself as being within this exception it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say upon his oath that his answer to that question might criminate himself.

See, also, *Hale v. Henkel*, 201 U.S. 43, 69 (1906) ("The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness"); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (citations omitted)("[T]he decisions of this Court are explicit in holding that the privilege against self-incrimination 'is solely for the benefit of the witness'"). As such, the

privilege must be taken by the witness personally; it cannot be taken by a party to the case. See *Hawaii v. Lanier*, 40 Haw. 65, 75 (1953):

> The majority of the cases follow the rule that the privilege is an option of the witness and the objections must be taken by him personally on his oath after the question has been asked; that it cannot be raised by a party to the suit in behalf of the witness unless such party is himself the witness in question; and where the party and the witness are identical, the witness's counsel cannot make claim on the party-witness's behalf, though there are decisions to the contrary. (Wigmore, Evidence, 3d ed., vol. 8, § 2270 [2], p. 402; Jones, Evidence, 2d ed., vol. 6, § 2490, p. 4927; 70 C. J., Witnesses, § 906; 58 Am. Jur., Witnesses, § 48.)

Here, it was the defendant, not Ms. Batt, who pursued this issue throughout the appellate process, and the Ohio Supreme Court implicitly endorsed this unheard-of procedure when it rejected the State's argument that defendant lacked standing to challenge the immunity grant: "Because Susan Batt lacked a valid Fifth Amendment privilege against self-incrimination and the grant of immunity was unlawful, the state's standing argument lacks merit."[7]

The court, however, cited no authority permitting the defendant, rather than the witness, to object to an immunity grant. Instead, every case discussing immunity grants involves an objection by the witness attempting to exercise

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7 *Reiner*, 89 Ohio St.3d at 356, 731 N.E.2d at 675, App., *infra*, 25.

the privilege, not the defendant trying to craft a fair-trial argument. See, *e.g.*,*United States v. Burr*, 25 F. Cas. 38; *Temple v. Commonwealth*, 75 Va. 892 (1881); *Hoffman v. United States*, 241 U.S. 479; *Ballantyne v. United States*, 237 F.2d 657; *Rogers v. United States*, 340 U.S. 367; *In the Matter of Atterbury*, 316 F.2d 106 (6th Cir. 1963); *United States v. Goodman*, 289 F.2d 256 (4th Cir. 1961); *United States v. Zwillman*, 108 F.2d 802 (2d Cir. 1940); *Abrahms v. United States*, 64 F.2d 22 (2d Cir. 1933); *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942); *United States v. Gordon*, 236 F.2d 916 (1956); *United States v. Weisman*, 111 F.2d 260 (2d Cir. 1940); *In the Matter of Doyle*, 257 N.Y. 244, 177 N.E. 489 (1931); *Hawaii v. Lanier*, 40 Haw. 65.

Against this great weight of authority, and citing no supporting authority of its own, the Ohio Supreme Court bestowed a privilege on the defendant that was not his to invoke as a matter of law. In so doing, the court acted against the vast majority of cases that do not permit such procedures, and, on this basis alone, this Court should grant the petition.

B. The Trial Court Properly Permitted Ms. Batt To Invoke Her Fifth Amendment Privilege

As this Court reiterated almost 50 years ago, the Fifth Amendment, as with any fundamental constitutional right, "must be accorded liberal construction in favor of the right that it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 489, citing *Counselman v. Hitchcock*, 142 U.S. 547, 562; *Arndstein v. McCarthy*, 254 U.S. 71, 72-73. "To apply the privilege narrowly or begrudgingly -- to treat it as an historical relic, at most to be tolerated -- is to ignore its

development and purpose." *Quinn v. United States*, 349 U.S. 155, 162 (1956).

Hoffman further underscored this breadth by pointing out that the privilege protects against not only questions that directly support a conviction, but also to those that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id.*, citing *(Patricia) Blau v. United States*, 340 U.S. 159 (1950). "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial." *Blau* at 161.

The justification for this broad view is clear:

> Answers to questions which at first blush may appear wholly innocuous, may, under certain existing circumstances, furnish a link connecting the witness with a criminal act and show that ***the danger apprehended by the witness was not fanciful.***

In the Matter of Atterbury, 316 F.2d 106, 110 (emphasis added). See, also, *Emspak v. United States*, 349 U.S. 190 (1955):

> Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself.

Id. at 199, quoting *United States v. Burr*, 25 Fed. Cas. 38, 40. See, also, *Malloy v. Hogan*, 378 U.S. 1 (1964):

> ***[I]n determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be***

> ***skeptical;*** rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry.

Id. at 13, n. 9 (emphasis added), quoting *United States v. Coffey*, 198 F.2d 438, 440-41 (3d Cir. 1952).

This broad approach is in keeping with longstanding practice. Once a witness invokes the privilege, "it is for the [trial] court to say whether his silence is justified." *Hoffman* at 486, citing *Rogers v. United States*, 340 U.S. 367. The trial court may require the witness to answer only if it is "'***perfectly clear*** ... that the witness is mistaken and that the answer[s] ***cannot possibly*** have such tendency' to incriminate." *Id.* at 488 (emphasis added), quoting *Temple v. Commonwealth*, 75 Va. 892, 899, and citing *Counselman* and *Arndstein*.

This permissive standard applies even where, as the Ohio Supreme Court alleges here,[8] the State does not intend to indict the witness. See *United States v. Gordon*, 236 F.2d 916, 919:

> The government stresses the fact that, at the hearing, 'the government stated unequivocally that it had no present intention of indicting Gordon.' But that intention could not bind the government if later it decided to seek defendant's indictment.

The reason the prosecution's intentions are irrelevant is that, irrespective of the prosecution's plans, there remains

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8 See *State v. Reiner*, 89 Ohio St.3d at 354, 731 N.E.2d at 674, App., *infra*, 21, where the court, claiming that Ms. Batt had no Fifth Amendment privilege to assert, commented: "The prosecution informed the [trial] court that it had no intention of prosecuting Susan Batt."

the potential that the witness's testimony may nonetheless be incriminating. See *Zicarelli v. New Jersey Comm. Of Investigation*, 406 U.S. 472 (1972):

> When considering whether a claim of the privilege should be sustained, the court focuses inquiry on what a truthful answer ***might*** disclose, rather than on what information is expected by the questioner.

Id. at 480 (emphasis added), citing *Hoffman v. United States.*

Surprisingly, it was an Ohio jurist who long ago pointed out that, in deciding whether a witness's invocation of the privilege is justified, the trial court need only conduct a totality-of-the-circumstances type of review:

> To sustain the privilege, it need only be evident from ***the implications of the question, in the setting in which it is asked,*** that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. ***The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'*** See Taft, J., in *Ex parte Irvine*, 74 F. 954, 960 (C. C. S. D. Ohio, 1896).

Hoffman at 486-87 (emphasis added). In fact, to require any more from the witness would require him to forfeit the very right he is attempting to invoke:

> [I]f the witness, upon interposing his claim, were required to prove the hazard in the sense

> in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee.

Id. at 486.

Finally, as even the Ohio Supreme Court itself once recognized, the trial court's decision to grant or deny immunity is reviewable only for an abuse of discretion. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916 (1987).

Here, the Ohio Supreme Court ignored this longstanding liberal standard and based its ruling largely on three premises. First, citing no authority, it claimed that "[t]here is no need for a grant of immunity where the witness denies all culpability." 89 Ohio St.3d at 354, 731 N.E.2d at 674, App., *infra*, 20. Second, it pointed out that the State "had no intention of prosecuting Susan Batt." *Id.* Finally, it concluded that "[b]ased on the prosecutors' statements alone, the trial judge had a duty to question Susan Batt's assertion of the privilege and whether her testimony would, as she claimed, be self-incriminating." 89 Ohio St.3d at 355, 731 N.E.2d at 675, App., *infra*, 22.

Each claim is feckless. It should be self-evident that a witness's mere claim of innocence does not preclude invoking the fundamental Fifth Amendment privilege. See *Reiner*, 89 Ohio St.3d at 361, 731 N.E.2d at 679, App., *infra*, 33 (Cook., J., dissenting): "Witnesses who deny ultimate culpability for the defendant's alleged offense should not be categorically denied access to the Fifth Amendment privilege." Instead, upon examining "the implications of the question[s] and the setting in which [they] are asked,"[9] it is clear here that Ms. Batt had "reasonable cause to apprehend

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9 *Hoffman*, 341 U.S. at 486-487.

danger from a direct answer."[10] Ms. Batt, despite her claims of innocence, was one of only three persons entrusted with Alex's care, and she spent appreciable amounts of time caring for Alex, often alone.[11] And the linchpin of defendant's defense was that it was Ms. Batt, not defendant, who killed Alex.[12] Additionally, as Ms. Batt's counsel recognized, immunity was necessary because even seemingly innocuous questioning can reveal incriminating information. See App., *infra*, 121:

> Your Honor, I think with my client being a focus of at least of [*sic*] the defense, and she is potentially in the time frame as to when these matters may have occurred, I have no idea what else the defense may be presenting. But she may be called to show that when certain of these injuries have occurred that the only person that could have been potentially available was my client. And clearly it's our plan to enter the Fifth Amendment to any questioning unless we are granted a complete and absolute immunity ... ."

It is against this backdrop that the Ohio Supreme Court, in an unprecedented narrowing of a witness's Fifth Amendment rights, substituted its judgment for that of the trial court and declared that Ms. Batt somehow fell outside the Fifth Amendment privilege's wide scope of protection.

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10 *Id.* at 486.

11 In fact, "[f]or two weeks prior to the death of Alex, Susan Batt was the person who was in this [the Reiners'] home alone with Alex with his siblings for 40 hours a week." App., *infra*, 141.

12 Even the Ohio Supreme Court made this observation. *Reiner*, 89 Ohio St.3d 342, 356, 731 N.E.2d 662, 675, App., *infra*, 21-22.

The court's assertion, that immunity was inappropriate merely because the State did not intend to prosecute Ms. Batt, is equally erroneous, because the prosecution's stated intent is not binding.[13] And, finally, the court's apparent requirement that the trial court question Ms. Batt's assertion of the privilege -- again, under these circumstances -- would all but have required Ms. Batt to prove the very hazard of incrimination from which she sought protection. This runs against the very fabric of *Hoffman* and countless other decisions.

C. The Ohio Supreme Court Improperly Applied A *De Novo* Standard Of Review On Appeal

Once a witness invokes his Fifth Amendment privilege, it is for the trial court, not some loftier appellate tribunal, to say whether his silence is justified. *Hoffman*, 341 U.S. 479, 486, citing *Rogers v. United States*, 340 U.S. 367. The Ohio Supreme Court, strangely enough, once adhered to this principle. See *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916: "[T]he trial court must determine whether granting immunity would further the administration of justice. Clearly, that decision lies within the sound discretion of the trial court. It is well-established that when a court has discretion to act, its only duty is to exercise that discretion."

Here, the trial court heard statements establishing that Ms. Batt was Alex's full-time, on-site, exclusive caretaker

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13 See *United States v. Gordon*, 236 F.2d 916, 919:

> The government stresses the fact that, at the hearing, 'the government stated unequivocally that it had no present intention of indicting Gordon.' But that intention could not bind the government if later it decided to seek defendant's indictment.

and that she was potentially on the scene when injuries were sustained not only by Alex but also by his twin brother. It was against this backdrop that the trial court granted Ms. Batt immunity to testify so that the State could proceed with its case.

The Ohio Supreme Court reversed the lower court's straightforward ruling. Its rationale was that Ms. Batt's testimony was not incriminating, that she, accordingly, had no Fifth Amendment privilege *to* assert, and, in turn, that the trial court had no discretion *to* abuse. *Reiner*, 89 Ohio St.3d at 356, 731 N.E.2d at 676, App., *infra*, 25. The trial court, however, did not have the luxury of hindsight when it determined that the Fifth Amendment privilege was warranted. Simply stated, there was no evidence -- not even an Ohio Supreme Court finding -- that the trial court abused its discretion in finding that Ms. Batt had a privilege to assert. Accordingly, this petition should be granted for this Court to establish that, absent an abuse of discretion, a trial court's determination of whether a witness's silence is justified must be affirmed on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
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(2)

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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163 pp

State of Ohio v. Reiner
89 Ohio St. 3d 342; 731 N.E.2d 662
2000 Ohio LEXIS 1847 (2000)
The Supreme Court of Ohio

PRIOR HISTORY: APPEAL and CROSS-APPEAL from and CERTIFIED by the Court of Appeals for Lucas County, No. L-97-1002.

Appellee and cross-appellant, Matthew Reiner, was convicted by a jury of involuntary manslaughter for the death of his two-month-old infant son, Alex Reiner. Alex died as a result of "shaken baby syndrome."

On June 15, 1995, Deborah S. Reiner gave birth to twin boys named Alex and Derek. Both boys were premature at birth but otherwise healthy. The Reiners also had a two-year-old daughter named Amy. Following the birth of the twins, both parents took time off from work to care for them. Matthew Reiner took leave from his job as an engineer from June 15 to July 25, 1995. Deborah Reiner, a dentist, did not return to work until August 14, 1995.

The Reiners hired a full-time babysitter, Susan Batt, age twenty-four, to care for their three children. Susan Batt began working on July 25, 1995, under Deborah Reiner's supervision while Susan Batt became acclimated to the family. During the first week of Susan Batt's employment, Deborah Reiner spent most of her time at home. In the final two weeks before Deborah Reiner returned to work, she left the home on several occasions with Amy, leaving Susan Batt alone with the twins. Susan Batt became the full-time exclusive childcare provider on August 14, 1995.

Over a period of two weeks, the following events occurred. Alex became ill the weekend of August 12, 1995. He appeared to be achy and vomited several times. Deborah Reiner called the pediatrician and then took Alex to an outpatient clinic on Sunday, August 13. The clinic doctor diagnosed stomach flu and recommended that Deborah Reiner give Alex Pedialyte.

By Wednesday, August 16, 1995, Alex had improved and appeared to have recovered. The twins' pediatrician performed a well-care examination of both boys that day. The results were unremarkable.

Deborah Reiner stayed home with the children on Wednesday, August 23, 1995, her regular day off. Alex seemed achy that day but had no fever. On Thursday, August 24, 1995, Susan Batt telephoned Matthew Reiner at work and reported that Alex had vomited in the morning. He told her to give Alex some Pedialyte. On Friday, August 25, Susan Batt telephoned Deborah Reiner at work to report that Alex had vomited. Deborah Reiner's mother came over Friday afternoon to help care for the children. Alex remained ill and vomiting over the weekend, still with no fever.

On Monday, August 28, 1995, when Deborah Reiner returned home after work, Susan Batt reported that Alex had eaten well and taken two five-hour naps that day. He appeared achy but did not have a fever, and Susan Batt had given him Tylenol. Susan Batt left the Reiners that evening between 5:30 and 6:00 p.m. Later that evening, Deborah Reiner's parents stopped by to drop off Amy, who had spent the day with them. They stayed and visited until 7:30 p.m. when Matthew Reiner arrived home.

Alex vomited again that evening at 9:00 p.m. The couple put the twins to bed at approximately 10:30 that night. Later, they heard Alex whimpering. Matthew Reiner took Alex downstairs. He claimed that he laid Alex on his (Matthew's) chest to try to get the baby comfortable and to fall asleep. Within a half hour, Alex's breathing became labored and he became unresponsive. Matthew Reiner took Alex to his bedroom to awaken his wife. She could not get Alex to respond, so Matthew Reiner called 911.

When emergency personnel arrived, Alex had no pulse and was not breathing. His skin was blue. They transported Alex to a nearby hospital, where he was placed on a respirator. Two days later, on August 30, 1995, Alex was removed from life support and died.

Dr. James Patrick, Lucas County Coroner, performed an autopsy. He concluded that Alex had died from "shaken baby syndrome." Dr. Patrick estimated that the time of injury was the evening of Monday, August 28, 1995, most likely within minutes of the onset of respiratory arrest when Matthew Reiner had been alone with Alex, but at most, within two to three hours of the onset.

A grand jury indicted Matthew Reiner for involuntary manslaughter. The case proceeded to trial. The key issue at trial was the timing of the fatal trauma to Alex. The defense theory was that Susan Batt, not Matthew Reiner, was the culpable party. The defense presented evidence that all three Reiner children had been healthy from birth until the weekend of August 11, 1995, after Susan Batt became employed. Deborah Reiner testified that her children had no medical problems from

the time of Alex's death until the trial, after Susan Batt left the Reiners' employ. Deborah Reiner also testified that no other family members had contracted a stomach virus or suffered symptoms similar to Alex's during the last two weeks of August despite their close proximity to Alex, in particular his twin, Derek, who slept in the same crib. There also was evidence of additional injuries to Alex and injuries to Derek. A hospital radiologist testified that x-ray films of Alex taken at the hospital on August 29, 1995, indicated a broken rib and broken leg. Subsequent x-rays of Derek indicated that he suffered from three broken ribs.

Dr. Patrick testified on behalf of the prosecution. He explained that, based upon his findings from the autopsy and the lack of any evidence of a blow to the head or other significant trauma, Alex had died of shaken baby syndrome. Dr. Patrick testified that the brain had been injured when it was "subjected to forces operating in different directions" that caused the blood vessels to tear. He described these forces as "shearing forces" that rapidly disrupted the electrical circuitry of the brain and caused loss of consciousness. Dr. Patrick testified that when this occurs, the brain is profoundly disrupted and no longer capable of responding to stimuli. Although there was evidence of brain swelling, Dr. Patrick testified that swelling is merely an indication that there has been an injury.

After the autopsy, Dr. Patrick prepared slides of brain tissue in order to examine microscopically the various injuries inside the brain. He testified that the slides confirmed the presence of blood and the brain injury.

During cross-examination, defense counsel questioned Dr. Patrick about the significance of the swelling of the brain, or edema. Dr. Patrick stated that although edema was present and

played a role, the principal problem was the mechanical disruption to the circuits of the brain. Defense counsel then asked Dr. Patrick about his testimony to the grand jury in which he attributed Alex's loss of consciousness and lack of breathing to swelling of the brain within a confined space. When confronted with statements taken from his testimony given to the grand jury in this case, Dr. Patrick reviewed the page from the grand jury transcript and admitted that he had made the statements.

The trial court refused to admit into evidence only one page from the transcript of Dr. Patrick's grand jury testimony because one page taken out of context would not have fairly and accurately represented his grand jury testimony. Defense counsel, however, would not agree to the admission of the entire statement. Defendant then moved to strike Dr. Patrick's opinion as unreliable under Evid.R. 702(C). The court overruled the motion.

Dr. Elizabeth K. Balraj, the Cuyahoga County Coroner and a professional acquaintance of Dr. Patrick, also testified on behalf of the prosecution. She testified that the Lucas County Coroner's Office sent her information about this case, including the autopsy report, Alex's medical records, and photographs and slides taken at the time of the autopsy. Dr. Balraj also testified that Alex died as a result of shaken baby syndrome. In response to a lengthy hypothetical question that asked Dr. Balraj for her opinion "to a reasonable degree of medical certainty" as to when the injury was inflicted upon Alex in relation to his collapse, Dr. Balraj responded that "the type of injuries and the information that you have given me is consistent with the child sustaining the injury sometime between 10:30 p.m. and 11:00 p.m."

Susan Batt was subpoenaed by the prosecution and the defense. She invoked her Fifth Amendment privilege against self-incrimination and refused to testify. She had also invoked her Fifth Amendment privilege while testifying in the juvenile court proceeding. The prosecution requested that the court grant Susan Batt transactional immunity pursuant to R.C. 2945.44 and compel her to testify. The prosecution told the court that it did not presently intend to prosecute Susan Batt for this crime. The court granted her transactional immunity.

Having been granted transactional immunity, Susan Batt subsequently testified. She explained to the jury that she had refused to answer questions without a grant of immunity upon the advice of counsel although she had done nothing wrong. She testified that she had attended a nanny and governess school in Cleveland. She previously worked for three years as a live-in nanny for another family with three children. She learned of the position with the Reiner family through a newspaper ad. She began working limited hours for the Reiners on July 25, 1995, while she became acquainted with the children and their routines. When Deborah Reiner returned to work on August 14, 1995, Susan Batt worked from 7:30 a.m. to 5:30 p.m. on Mondays, Tuesdays, Thursdays, and Fridays.

Susan Batt testified that she had never shaken the children while she was alone with them. She specifically denied shaking Alex on August 28, 1995. She testified that she did nothing to harm any of the Reiner children. She also testified that she was not aware that Alex had a broken leg or that Derek had some broken ribs. She denied that she had anything to do with the broken bones.

Susan Batt testified that she last worked for the Reiners on Tuesday, August 29, 1995, the day after Alex had been taken to the hospital. She learned of Alex's death through the news. She had no further contact with Reiners.

On September 23, 1996, a jury convicted Matthew Reiner of involuntary manslaughter. Two weeks later, the defense filed a motion for acquittal or, in the alternative, for a new trial. The defense claimed that the verdict was not supported by the evidence. The defense also alleged legal errors and procedural irregularities with regard to the grant of immunity to Susan Batt, jury instructions related to Batt's testimony and her implied admission of guilt, and the court's refusal to permit defense counsel to ask Susan Batt about other injuries to the Reiner children.

The defense motion alleged prosecutorial misconduct in failing to disclose that Dr. Patrick was allegedly changing his testimony or theory of the case. The defense also claimed that the trial court should have admitted Dr. Patrick's grand jury testimony as a prior inconsistent statement, and that the court should have stricken as unreliable the opinions of the coroners who testified for the prosecution. Finally, the defense alleged juror misconduct and attached the affidavit of Rolf R. Sandberg, an alternate juror. In his affidavit, Rolf Sandberg admitted that during the trial, he had discussions with several other jurors about the case, including assessments and characterizations of the evidence, the credibility of witnesses, and his opinion about the guilt or innocence of the defendant.

The trial court conducted an in camera inspection of Rolf Sandberg on October 31, 1996. The court then subpoenaed each juror to appear and testify about the alleged misconduct.

Thereafter, the trial court denied the motion for new trial. The court determined that Rolf Sandberg's affidavit did not constitute competent non-juror evidence under Evid.R. 606(B), because he was an alternate juror. Furthermore, even assuming that Rolf Sandberg's affidavit was competent evidence, the court concluded that he was not a credible witness. The court said it should not have conducted the hearing and specifically was not considering any statement by the jurors. The court found no prejudice to the defendant as a result of any jury conduct, and even if misconduct occurred that was presumed to be prejudicial, the state had rebutted the presumed prejudice beyond a reasonable doubt.

Matthew Reiner appealed his conviction to the Lucas County Court of Appeals. The appellate court reversed the trial court solely on the issue of juror misconduct. The appellate court considered Rolf Sandberg's affidavit as outside evidence of extraneous prejudicial information that had been improperly brought to the jury's attention. The appellate court concluded that there had been juror misconduct that was prejudicial to the defendant. The appellate court also considered as misconduct the failure of the other jurors to abide by the trial court's instruction not to discuss the case with anyone including each other until deliberations began. The court considered this fact to be evidence that Rolf Sandberg's conduct tainted the jury panel.

The appellate court affirmed the trial court's grant of transactional immunity to Susan Batt. The court held that, at the time immunity was granted, it did not appear to Susan Batt that she lacked culpability because she knew the defense was going to try to blame her for Alex's death. When it granted her immunity, the trial court did not know if the defense had any

evidence that would implicate Susan Batt. Therefore, at the time, the trial court would not have known that Susan Batt's assertion of her Fifth Amendment right against self-incrimination was a mistake.

The appellate court also affirmed the trial court's refusal to strike Dr. Patrick's testimony as to the cause of Alex's death. The court reasoned that the defense's objection that Dr. Patrick did not have the appropriate tissue slides to support his conclusion about the cause of death went to the weight of the evidence rather than to its admissibility. The appellate court also upheld the trial court's decision not to admit Dr. Patrick's grand jury testimony as a prior inconsistent statement. The appellate court concluded that Dr. Patrick admitted he had made the alleged inconsistent statements to the grand jury; thus, the trial court did not have to admit the prior testimony.

As to the legal sufficiency of the opinion given by Dr. Balraj concerning the timing of Alex's collapse, the appellate court concluded that Dr. Balraj's use of the word "consistent" instead of "probable," when giving her opinion as to the timing of the injury, was not a fatal error. In addition, the court determined that Dr. Balraj's testimony was cumulative. The appellate court also found that the trial court did not abuse its discretion in refusing to instruct the jury on implied admission of guilt.

Thereafter, the court of appeals determined that its judgment that Evid.R. 606(B) bars any inquiry of a juror as to the effect of extraneous information or improper outside influence upon his or her decision-making process was in conflict with State v. Thomas, 1995 Ohio App. LEXIS 3244 (July 26, 1995), Athens App. No. 94CA1608, unreported, 1995 WL 468183. The appellate court entered an order certifying a conflict.

The state appealed and the defendant filed a cross-appeal.

This cause is now before this court upon our determination that a conflict exists (case No. 99-427), and pursuant to the allowance of a discretionary appeal and cross-appeal (case No. 99-239).

DISPOSITION: Judgment affirmed in part, reversed in part and cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: The State challenged a judgment of the Court of Appeals for Lucas County (Ohio), which reversed appellee father's involuntary manslaughter conviction for the "shaken baby syndrome" death of his two-month-old son. Appellee cross-appealed, challenging the validity of the trial court's grant of transactional immunity to the infant's babysitter.

OVERVIEW: The lower appellate court reversed appellee's involuntary manslaughter conviction concluding there had been juror misconduct that was prejudicial to appellee. An alternate juror had submitted an affidavit admitting that during trial he had engaged in discussions with several other jurors about the case, including expressing his opinion about the guilt or innocence of appellee. The lower appellate court considered the affidavit as outside evidence of extraneous prejudicial information that had been improperly brought to the jury's attention. Judgment reversed as to juror misconduct issue, as the prohibitions against a court receiving evidence from a juror applied to alternate jurors as well. Therefore, the alternate juror's affidavit was not competent evidence to attack the jury's guilty verdict. The grant of transactional immunity to the full-time babysitter of appellee's son was improper as she did

not have a valid U.S. Const. amend. V privilege against self-incrimination upon which to base the immunity. There was no need for a grant of immunity because the babysitter denied all culpability in the boy's death. Cause was remanded for a new trial.

OUTCOME: Judgment reversed, in part; evidence from alternate juror regarding misconduct by jury, without other outside evidence, was insufficient evidence for trial court to rely on in order to conduct an inquiry of other jurors into validity of verdict. Further, as babysitter did not have a valid self-incrimination privilege, trial court's grant of immunity to her was erroneous and unlawful

Ohio R. Evid. 613(B)(1) states, in part, that extrpportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require.

SYLLABUS: 1. The prohibitions against receiving evidence from a juror in Evid.R. 606(B) apply to alternate jurors.

2. Evidence received from an alternate juror, without other outside evidence, is insufficient *aliunde* evidence under Evid.R. 606(B) upon which a court may rely in order to conduct an inquiry of other jurors into the validity of a verdict.

COUNSEL: Julia R. Bates, Lucas County Prosecuting Attorney, John J. Weglian and J. Christopher Anderson, Assistant Prosecuting Attorneys, for appellant and cross-appellee.

Fritz Byers, Robert Z. Kaplan and Samuel Z. Kaplan; Cooper, Walinski & Cramer and Richard S. Walinski, for appellee and cross-appellant.

JUDGES: WOLFF, F.E. SWEENEY and PFEIFER, JJ., concur. DOUGLAS, J., concurs separately. MOYER, C.J., dissents. COOK, J., concurs in part and dissents in part. WILLIAM H. WOLFF, JR., J., of the Second Appellate District, sitting for RESNICK, J.

OPINIONBY: LUNDBERG STRATTON

OPINION:

LUNDBERG STRATTON, J. The Lucas County Court of Appeals stated the certified conflict as "whether Evid.R. 606(B) permits, under any circumstances, inquiry of a juror as to the effect of extraneous information or improper outside influence upon his or her decision making process." The dissenting judge framed the same issue as follows: "In a case of jury misconduct (statements, conversations or remarks made to a juror), once evidence *aliunde* of jury misconduct is provided, whether a court may inquire of a juror as to whether or not the juror remained uninfluenced by the misconduct (*i.e.*, impartial) so that the defendant was not denied his substantial rights." Because this latter statement more succinctly states the issue, we shall consider the certified conflict in the terms articulated by the dissenting judge.

The state's discretionary appeal involves the related issues of burden of proof when there are allegations of juror misconduct in a criminal case, and whether an affidavit from an alternate

juror constitutes outside evidence sufficient to trigger the application of Evid.R. 606(B), otherwise known as the *aliunde* rule.

The defendant's cross-appeal challenges the validity of the transactional immunity granted to Susan Batt, the reliability of the opinions rendered by the state's medical witnesses, the trial court's failure to admit Dr. Patrick's grand jury testimony for impeachment purposes, and Dr. Balraj's expression of her medical opinion on causation.

For the reasons more fully set forth below, we reverse the judgment of the court of appeals as to juror misconduct and the grant of transactional immunity to Susan Batt, and we affirm the remainder of the court's judgment.

JUROR MISCONDUCT

Because the certified conflict presumes the existence of *aliunde* evidence, before we may address this issue, we must decide the threshold question of whether Evid.R. 606(B), also known as the *aliunde* rule, applies to alternate jurors. For the reasons more fully set forth below, we hold that the prohibitions against receiving evidence from a juror in Evid.R. 606(B) apply to alternate jurors. Therefore, evidence received from an alternate juror, without other outside evidence, is insufficient *aliunde* evidence under [**671] Evid.R. 606(B) upon which a court may rely in order to conduct an inquiry of other jurors into the validity of a verdict.

It is a longstanding rule that "the verdict of a jury may not be impeached by the evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by

competent evidence *aliunde*, *i.e.*, by evidence from some other source." *State v. Adams* (1943), 141 Ohio St. 423, 427, 25 Ohio Op. 570, 572, 48 N.E.2d 861, 863. Ohio has adopted this rule in Evid.R. 606(B), which states:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, *only after some outside evidence of that act or event has been presented.* However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. *His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.*" (Emphasis added.)

The rule is intended to preserve the integrity of the jury process and the privacy of deliberations, to protect the finality of the verdict, and to insulate jurors from harassment by dissatisfied or defeated parties by prohibiting a court from questioning a juror about what occurred during deliberations, or about anything else that may have affected the juror's mind or emotions in the deliberations process once a final verdict is rendered. *State v. Schiebel* (1990), 55 Ohio St. 3d 71, 75, 564 N.E.2d 54, 61; *State v. Adams*, 141 Ohio St. at 427, 25 Ohio Op. at 572, 48 N.E.2d at 863. However, if there is a foundation

of outside evidence of extraneous prejudicial information, or of any threat, bribe, or improper conduct by an officer of the court, the rule permits a court to ask a juror about that outside evidence.

The trial court determined that Rolf Sandberg's affidavit was not competent evidence to attack the jury's verdict under Evid.R. 606(B). The court reasoned that the intent of Evid.R. 606(B), to prevent an attack by a disgruntled juror, should likewise apply to an alternate juror.

The court of appeals reversed on the basis of *State v. Rudge* (1993), 89 Ohio App. 3d 429, 624 N.E.2d 1069. The *Rudge* court considered an alternate juror to be outside the regular jury panel because an alternate does not participate in deliberations or in reaching the final verdict. *Id.*, 89 Ohio App. 3d at 437, 624 N.E.2d at 1074. In *Rudge*, after the trial was over, an alternate juror informed the bailiff that on two occasions he had overheard other jurors make statements about the defendant prior to opening statements and during the trial. The trial court conducted an *in camera* examination of the alternate juror, followed by an examination of the remaining jurors. The court granted a mistrial on the basis that one of the statements was prejudicial. The court of appeals noted that, as a nondeliberating juror, an alternate may not be viewed as a member of the jury, so that the alternate's testimony may constitute *aliunde* evidence for purposes of Evid.R. 606(B). However, the *Rudge* court concluded that Evid.R. 606(B) was not applicable, because the trial court's inquiry did not threaten or reveal discussion during deliberations. The *Rudge* court considered it proper to inquire into the partiality of jurors to determine if the defendant had received a fair trial before an impartial jury, but not to inquire into deliberations. *Id.*, 89 Ohio

App. 3d at 439, 624 N.E.2d at 1076. Based upon *Rudge*, the court of appeals held that Rolf Sandberg's affidavit was sufficient outside evidence for the court to have inquired of the jurors about the alleged misconduct that occurred during the trial.

It is apparent from the language of Evid.R. 606(B) that the rule becomes applicable only when the validity of a verdict is questioned. Although Evid.R. 606(B) protects the deliberations process, the language of the rule does not limit its application to the examination of improper conduct or communications only during deliberations. The rule also prohibits inquiry into "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict * * * or concerning his mental processes in connection therewith." This may involve inquiry into improper conduct that occurred throughout the trial, during the presentation of evidence, or among jurors during the course of the trial that may influence a juror's mind, emotions, or mental processes during deliberations. Events that occur during the trial may also have an effect upon the jurors' deliberations.

Alternate jurors are selected at the same time and in the same manner as the entire jury panel. An alternate juror participates as a regular member of the jury panel and is subject to the same jury admonitions and rules until discharged. The alternate juror sees and hears the entire trial and is prepared to deliberate. An alternate juror may become a member of the deliberating panel. *State v. Hutton* (1990), 53 Ohio St. 3d 36, 45, 559 N.E.2d 432, 443.

Here, Rolf Sandberg was an alternate juror who claimed that he violated jury rules during the trial. However, he waited until

after the verdict before notifying defense counsel about his conduct in an effort to challenge the finality of the verdict. When questioned by the trial judge, Rolf Sandberg admitted that he was frustrated that he had not been able to deliberate and that he was upset with the guilty verdict. Although the defense claimed that Rolf Sandberg's misconduct affected the deliberations process and tainted the verdict, the defendant presented no outside evidence of the improper conduct. This is precisely the situation that the *aliunde* rule was intended to prevent--a disgruntled juror attacking the verdict.

Had the trial judge been notified of this conduct during the trial, the judge would have had an opportunity to inquire of the jurors about any misconduct or violation of the jury rules because the *aliunde* rule was not yet applicable. See *State v. Taylor* (1991), 73 Ohio App. 3d 827, 598 N.E.2d 818. Although Rolf Sandberg did not deliberate, he was privy to the jury process up to the actual deliberations. His alleged misconduct during the trial had nothing to do with his status as an alternate juror and could just as likely have been committed by a regular juror. The defense sought to attack the final verdict based upon Rolf Sandberg's conduct during the trial prior to his discharge. Therefore, for purposes of the *aliunde* rule, one's status as an alternate juror should not preclude application of the rule. Therefore, we disapprove of the decision in *State v. Rudge* to the extent that it holds otherwise.

When the defendant moved for acquittal or, in the alternative, a new trial, based solely on the alleged juror misconduct in Rolf Sandberg's affidavit, the trial court properly concluded that it was prohibited by Evid.R. 606(B) from considering Rolf Sandberg's affidavit or testimony for purposes of attacking the jury verdict. The court correctly disregarded the testimony of

other jurors. Consequently, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court with respect to the issue of juror misconduct.

Having determined that the affidavit from the alternate juror was not competent evidence *aliunde* to challenge the jury's verdict, our resolution of this case effectively removes any conflict that may have existed with *State v. Thomas, supra,* because that case involved a juror's contact with a non-juror.

IMMUNITY FROM PROSECUTION

Defendant's cross-appeal challenges the validity of the trial court's grant of immunity to Susan Batt. The defendant alleges that the grant of transactional immunity pursuant to R.C. 2945.44 was unlawful because Susan Batt did not have a valid Fifth Amendment privilege against self-incrimination upon which to base the immunity. Defendant claims that, as a consequence, his rights were prejudiced. We agree.

The Fifth Amendment declares that "no person * * * shall be compelled in any criminal case to be a witness against himself * * * ." This right, or privilege, ensures that a person is not compelled to produce evidence that may tend to incriminate him. The privilege, however, is not unlimited. A person may decline to answer specific questions "only when the danger of incrimination is real and appreciable, rather than imaginary and insubstantial," or when the answer could reasonably "[furnish] a link in the chain of evidence" against him. *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 228, 15 Ohio B. Rep. 311, 366, 473 N.E.2d 264, 318. See *United States v. Apfelbaum* (1980), 445 U.S. 115, 100 S. Ct. 948, 63 L. Ed. 2d 250; *Hoffman v. United States* (1951), 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118, 1124.

When a witness asserts a privilege against self-incrimination, a court may not rely upon the witness's claim alone. *State v. Landrum* (1990), 53 Ohio St. 3d 107, 120, 559 N.E.2d 710, 726. The court has a duty to determine if the witness's refusal to answer is justified. *Id.* If the court determines that a witness is mistaken about the danger of incrimination, then the court must require the witness to answer the question. *Hoffman v. United States*, 341 U.S. at 486, 71 S. Ct. at 818, 95 L. Ed. at 1124.

However, when the court is satisfied that the witness's refusal to answer is justified, a court may either excuse the witness from testifying or, upon the written request of the prosecuting attorney, may compel the witness to answer by granting that person immunity from prosecution for any criminal act about which the person may testify. R.C. 2945.44; *State v. Kirk* (1995), 72 Ohio St. 3d 564, 651 N.E.2d 981; *State ex rel. Leis v. Outcalt* (1982), 1 Ohio St. 3d 147, 1 Ohio B. Rep. 181, 438 N.E.2d 443.

In this case, the trial court relied upon R.C. 2945.44. It states:

"(A) In any criminal proceeding in this state * * *, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:

"(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court

of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;

"(2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

"(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he gave an answer or produced any information."

Transactional immunity is a prosecutorial tool to enable the government to obtain necessary testimony. *Leis*, 1 Ohio St. 3d at 149, 1 Ohio B. Rep. at 183, 438 N.E.2d at 446. The practical effect of a grant of immunity is that a witness is compelled to give information that the witness would otherwise be privileged to withhold in order to assist the prosecution. Often the witness who is compelled to testify is a co-defendant or is facing other charges related to the defendant's charges. The prosecution is willing to forgo possible prosecution of the witness by granting the witness immunity in exchange for useful testimony that will assist in convicting the defendant.

There is no need for a grant of immunity where the witness denies all culpability. In situations where an admission of guilt by one person would completely exonerate any possible guilt of another person, as is the case here, a grant of immunity is unnecessary and improper. An assertion of the Fifth

Amendment privilege by Susan Batt would lead one to believe that she possessed self-incriminating knowledge regarding her own culpability. Had Susan Batt been granted immunity and testified that she had shaken Alex and caused his death, the prosecution would have no further grounds to prosecute Matthew Reiner. To grant immunity in such a situation may have allowed the guilty party to go free and would not "further the administration of justice."

Susan Batt's counsel informed the court in advance of her testifying that she intended to assert her Fifth Amendment privilege and would refuse to answer questions. All counsel present knew that she had likewise asserted this privilege in a related juvenile court proceeding and did not answer any questions. Susan Batt's counsel explained that, although Susan Batt was not the focus of a criminal investigation, she had been with the victim within the potential time frame of the fatal trauma, she was the focus of the defense, and she did not know the identity of defense witnesses who may be called to inculpate her. Susan Batt would testify only if granted "complete and absolute immunity."

The prosecution initially seemed perplexed as to why Susan Batt would refuse to testify. The prosecution said that Susan Batt had told the Children's Services Board that she had nothing to do with the victim's injuries, and her counsel had not indicated that her testimony would incriminate her. The prosecution informed the court that it had no intention of prosecuting Susan Batt. She was not being investigated and there was insufficient evidence to take to the grand jury. The prosecution even told the court, "I don't know how in the interest of justice I can request immunity for this witness because it doesn't seem to me that she in any way has anything

to assert the Fifth Amendment privilege to protect herself, or I'm unaware of anything." However, when it became apparent that Susan Batt did not intend to testify, the prosecution reluctantly agreed to consider a request that the court grant Susan Batt transactional immunity, rather than request that the court use its contempt powers to force a reluctant witness to testify.

When Susan Batt took the witness stand at trial and invoked her Fifth Amendment privilege, the prosecution submitted a written request asking the court to grant her immunity pursuant to R.C. 2945.44. The court conducted a hearing on whether the grant of immunity would "further the administration of justice." R.C. 2945.44. However, the court did not address the prosecution's earlier concerns that Susan Batt had no apparent reason, other than her fear of Matthew Reiner's defense, to assert the Fifth Amendment privilege. Nevertheless, the court decided that it would be in the "interests of justice" to compel Susan Batt to testify. The court granted her transactional immunity.

Based on the prosecutors' statements alone, the trial judge had a duty to question Susan Batt's assertion of the privilege and whether her testimony would, as she claimed, be self-incriminating. *State v. Landrum, supra.* Instead, the trial judge merely relied upon Susan Batt's claim of privilege and disregarded the questions and concerns expressed by prosecutors. Susan Batt's testimony did not incriminate her, because she denied *any* involvement in the abuse. Thus, she did not have a valid Fifth Amendment privilege.

A court may resort to R.C. 2945.44 only after reaching the threshold determination that the witness's testimony would be

self-incriminating. This is apparent from the language of subsection (B) of the statute, which states that "if, but for this section, the *witness would have been privileged to withhold an answer* or any information given in any criminal proceeding * * *." (Emphasis added.) We agree with the defendant that before a court may exercise its authority to grant a person transactional immunity, it is implicit that the person has validly asserted the privilege against self-incrimination. Once the issue of immunity under R.C. 2945.44 arises, it is inherent that the court has already determined that the witness has a valid privilege against self-incrimination in order to invoke immunity. Here the trial court failed to make that determination.

The court of appeals below likewise recognized this threshold determination when it stated that "the language of R.C. 2945.44 implies that a trial court make some determination of the validity of the privilege against self-incrimination antecedent to a grant of statutory immunity." Nevertheless, the appellate court focused on circumstances that would have led the trial court to believe that Susan Batt was not mistaken in asserting her Fifth Amendment right against self-incrimination, *i.e.*, she knew that the defense blamed her for the baby's death and she did not know what evidence, if any, the defense may have had that would implicate her in the fatal trauma. Again, these are merely Susan Batt's assertions. A defense theory is not a ground for a grant of immunity when the witness continues to deny any self-incriminating conduct. The appellate court did not consider the prosecutors' statements or the fact that Susan Batt had denied any involvement in the abuse to Alex when questioned by Children's Services Board. These are factors that could and should have been considered by the trial court in determining whether Susan Batt's fear of self-incrimination was

real or imaginary.

In addition, the wrongful grant of immunity resulted in serious prejudice to the defendant. The essence of Matthew Reiner's defense was that Susan Batt was responsible for Alex's death. When the court granted her immunity, the court in effect was telling the jury that Susan Batt did not cause Alex's injuries. To "further the administration of justice," the jury should have been able to hear and evaluate all the evidence to decide whether someone other than Matthew Reiner was responsible for Alex's death. A grant of immunity to Susan Batt under these circumstances seriously affected the fairness of the trial and resulted in prejudice to the defendant.

The state argues that a defendant lacks standing to challenge a grant of immunity. *State v. Bika*, 1978 Ohio App. LEXIS 9311 (Oct. 19, 1978), Marion App. No. 9-78-6, unreported; *State v. Steverson*, 1998 Ohio App. LEXIS 4288 (Sept. 15, 1998), Franklin App. No. 97APA11-1466, unreported, 1998 WL 634949. This argument assumes that the grant of immunity met the statutory threshold of a valid privilege against self-incrimination. Because Susan Batt lacked a valid Fifth Amendment privilege against self-incrimination and the grant of immunity was unlawful, the state's standing argument lacks merit.

The state also contends that the defendant failed to preserve any error for appeal by failing to object to the grant of immunity. We do not agree. Defense counsel sufficiently objected to the grant of immunity when the court conducted a hearing on whether the grant of immunity would further the administration of justice.

Therefore, we find that a court has no judicial discretion to grant or deny immunity until and unless the statutory requirements for immunity are met. This includes a valid assertion of one's Fifth Amendment privilege. *Leis*, 1 Ohio St. 3d at 149, 1 Ohio B. Rep. at 183, 438 N.E.2d at 446. Because Susan Batt did not have a valid Fifth Amendment privilege, the trial court's grant of immunity was erroneous and unlawful.

EVIDENTIARY ISSUES

The defense contends that Dr. Patrick's theory of the cause of death was not based upon objectively verifiable facts as required by Evid.R. 702(C)(1). Therefore, it was not reliable evidence and Dr. Patrick's testimony should have been stricken. The defense relies upon the testimony of its expert witnesses who opined that the tissue slides taken by Dr. Patrick did not show the damage about which he testified.

A decision to admit the testimony of an expert, once qualified, is generally within the broad discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. See *State v. Williams* (1996), 74 Ohio St. 3d 569, 576, 660 N.E.2d 724, 732; *State v. Mack* (1995), 73 Ohio St. 3d 502, 511, 653 N.E.2d 329, 337. An abuse of discretion requires more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Clark* (1994), 71 Ohio St. 3d 466, 470, 644 N.E.2d 331, 335; *State v. Moreland* (1990), 50 Ohio St. 3d 58, 61, 552 N.E.2d 894, 898; *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 16 Ohio Op. 3d 169, 173, 404 N.E.2d 144, 149.

Here, the appellate court concluded that defense challenges to the reliability of the brain tissue slides concerned the weight of

the evidence, not its admissibility. We agree. This decision was within the broad discretion of the trial court and the court did not abuse its discretion with respect to the reliability of expert evidence within the confines of Evid.R. 702(C).

The defense also contends that Dr. Balraj failed to express her opinion as to the cause of death in terms of probability. When asked her opinion "to a reasonable degree of medical certainty as to when the injury was inflicted in relationship to the collapse," Dr. Balraj stated that "the type of injuries * * * [are] consistent with the child sustaining the injury between 10:30 p.m. and 11:00 p.m." The appellate court determined that the use of the word "consistent" was not fatal to Dr. Balraj's overall testimony because she was answering a hypothetical question predicated upon the appropriate standard of medical certainty. In addition, her testimony was cumulative. Looking at the overall context of her testimony, we agree that the trial court did not abuse its discretion when it refused to strike the testimony of Dr. Balraj for failure to include the word "probable" in her opinion.

The defense claims that the trial court should have admitted the grand jury testimony of Dr. Patrick as a prior inconsistent statement under Evid.R. 613(B). The defense contended that the opinion offered by Dr. Patrick before the grand jury as to the cause of death was different from the opinion that he rendered at trial. The trial court permitted the defense to cross-examine Dr. Patrick about a particular statement he had made to the grand jury. Dr. Patrick initially disagreed with statement but, after reviewing his grand jury transcript, he subsequently said that he recalled making the statement, although he attempted to qualify his answer and put it into context with the remainder of his grand jury testimony. The

statement alone could appear to be inconsistent.

The defense moved to introduce into evidence the one page from the transcript of Dr. Patrick's grand jury testimony that contained the alleged inconsistent statement. The court said it would admit the entire transcript from the grand jury in order to put the alleged inconsistency into context; however, the defense would not agree. Therefore, the court excluded the one-page exhibit.

Evid.R. 613(B)(1) states, in part, that extrinsic evidence of a prior inconsistent statement is admissible "if the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require."

Although the defense fulfilled the requirements of Evid.R. 613(B),we agree with the reasoning of the trial court that it would have been improper to admit only one page of Dr. Patrick's grand jury testimony because it would not fairly and accurately represent his testimony to the grand jury. The trial court acted within its discretion to exclude the exhibit when defense counsel would not agree to admission of the entire transcript. Evid.R. 106.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the court of appeals with respect to the juror misconduct and the grant of immunity to Susan Batt, and we affirm the remainder of the court's judgment. This cause is remanded to the trial court for

a new trial consistent with this opinion.

Judgment affirmed in part,

reversed in part and cause remanded.

WOLFF, F.E. SWEENEY and PFEIFER, JJ., concur.

DOUGLAS, J., concurs separately.
MOYER, C.J., dissents.

COOK, J., concurs in part and dissents in part.

WILLIAM H. WOLFF, JR., J., of the Second Appellate District, sitting for RESNICK, J.

CONCURBY: DOUGLAS; COOK (In Part)

CONCUR:

DOUGLAS, J., concurring. I concur with the ultimate judgment of the majority in remanding this cause to the trial court for a new trial. I write separately to specifically concur in the majority's opinion with regard to the immunity issue and the discussion of the issue found in the "Immunity From Prosecution" section of the opinion. I also write because I agree, with regard to the juror misconduct issue, with the analysis found in Chief Justice Moyer's dissenting opinion.

DISSENT BY: MOYER; COOK (In Part)

DISSENT:

MOYER, C.J., dissenting. I concur in the decision of the majority with respect to the grant of immunity to Susan Batt, and the evidentiary issues presented by the defense. However, I respectfully dissent from the decision of the majority holding that evidence received from an alternate juror who did not participate in deliberations is insufficient *aliunde* evidence under Evid. R. 606(B) to inquire into the validity of the verdict. While I recognize that allowing a party to question a jury verdict based on evidence presented by an alternate juror may have some detrimental consequences, I believe that the integrity of the jury process would be better preserved by allowing such inquiries.

Evid.R. 606(B) provides:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement *occurring during the course of the jury's deliberations* or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify * * * only after some outside evidence of that act or event has been presented." (Emphasis added.)

The majority correctly observes that Evid.R. 606(B) is intended to preserve the integrity of the jury process and the privacy of deliberations. Significantly, the rule prohibits testimony about events and statements occurring *during the course of deliberations*, absent some outside evidence of such occurrences. The rule does go further to prohibit inquiry into "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the

verdict * * * or concerning his mental processes in connection therewith." The majority relies on this additional language to conclude that testimony of an alternate juror is insufficient outside evidence to inquire into the validity of a jury verdict. However, the inclusion of the words "during the course of deliberations" in the first sentence of the rule indicates that Evid.R. 606(B) is meant to protect the deliberation process. Therefore, it follows that an alternate juror, who did not participate in deliberations, could properly supply the evidence necessary to inquire into the validity of the verdict reached by the jury.

The majority also concluded that the *aliunde* rule is not applicable during the trial. Instead, the rule applies only after the jury decides on a verdict. This fact further supports allowing an alternate juror, who did not participate in deliberations, to supply the evidence necessary to challenge a jury verdict pursuant to Evid.R. 606(B).

While I share the concern of the majority that allowing an alternate juror to provide the evidence needed to inquire into a jury's verdict could easily allow a single disgruntled alternate juror to attack a jury verdict, I believe that this risk is outweighed by the right of the parties to a jury free of misconduct. Section 5, Article I of the Ohio Constitution guarantees the right to a trial by jury, and this right carries with it by necessary implication the right to a trial by a jury of unbiased and unprejudiced jurors. *Lingafelter v. Moore* (1917), 95 Ohio St. 384, 117 N.E. 16.

Here, the appellate court found that there had been juror misconduct during the trial and that such misconduct was prejudicial to the defendant. I agree with the court of appeals

that Evid.R. 606(B) should be interpreted to allow testimony of an alternate juror as sufficient *aliunde* evidence to inquire into the validity of a jury verdict.

For these reasons, I would affirm the judgment of the court of appeals with respect to the issue of juror misconduct.

COOK, J., concurring in part and dissenting in part.

I. *Aliunde* Evidence/Juror Misconduct

The majority's syllabus suggests that an alternate juror's testimony can never be sufficient "outside evidence" under Evid.R. 606(B) to permit jurors to testify regarding extraneous prejudicial information. Like Chief Justice Moyer, I am not convinced that a discharged alternate juror's *status*--the status of having once served as an alternate juror--should in every case preclude the trial court from relying on that individual's testimony to trigger an inquiry into the validity of a verdict.

Under Civ.R. 47(C), "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." A discharged alternate juror thus no longer possesses "the same functions, powers, facilities, and privileges as the regular jurors." *Id.* A discharged alternate juror is thus no longer a "juror" for purposes of the Civil Rules. And I see no compelling reason to treat a discharged alternate juror as a "juror" under the *aliunde* rule either, since this evidentiary rule is designed to protect the sanctity of the deliberative process--a process in which the discharged alternate juror did not participate. Accord *State v. Rudge* (1993), 89 Ohio App. 3d 429, 437, 624 N.E.2d 1069, 1074 ("Alternate jurors who are not present during deliberations and

do not participate in rendering the verdict are not members of the trial jury for purposes of the *aliunde* rule").

Though the trial court in this case ultimately rejected *Rudge* and concluded that it could not use the alternate's affidavit as the basis to examine the jurors, the trial court also determined that *even if* the alternate's affidavit satisfied the *aliunde* rule, the juror examination revealed that Reiner suffered no prejudice. We review the trial court's decision denying Reiner's motion for a new trial on an abuse-of-discretion standard. *State v. Schiebel* (1990), 55 Ohio St. 3d 71, 564 N.E.2d 54, paragraph one of the syllabus. Without mentioning this deferential standard of review, the majority of the court of appeals concluded that what occurred was "by definition * * * prejudicial" to Reiner. The dissenting judge on the appellate panel noted that Reiner bore the burden of proving that any unauthorized communications with jurors resulted in actual juror partiality, and concluded that Reiner failed to meet his burden. I agree. As the trial judge stated, all of the jurors "uniformly denied" that any improper communication with the alternate juror affected their verdict.

Accordingly, like the majority, I would reverse the judgment of the court of appeals and reinstate the judgment of the trial court denying Reiner's motion for a new trial on the basis of juror misconduct. However, I do not join the majority's syllabus, because I share Chief Justice Moyer's view that the testimony of a discharged alternate juror is not categorically insufficient *aliunde* evidence for purposes of Evid.R. 606(B).

II. The Grant of Immunity to Susan Batt

I dissent from the majority's resolution of the immunity issue.

The majority concludes that the trial court's grant of immunity to Susan Batt was unlawful for two reasons. First, the majority concludes that Batt did not have a valid Fifth Amendment privilege against self-incrimination. Second, the majority decides that the grant of immunity that followed from this apparently invalid privilege resulted in "serious prejudice" to Reiner. I respectfully disagree on both counts.

A. Batt's Entitlement to the Fifth Amendment Privilege

I agree with the majority that the Fifth Amendment privilege against self-incrimination is "confined to instances where the witness has *reasonable cause* to apprehend danger from a direct answer." (Emphasis added.) *Hoffman v. United States* (1951), 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118, 1124. But the majority applies an inapposite test for "reasonable cause," deciding that "Susan Batt's testimony did not incriminate her because she denied *any* involvement in the abuse."

A witness's denial of culpability regarding an offense should not preclude the witness from asserting the privilege against self-incrimination. "The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant * * *." *Id.* There are many situations in which a witness could deny guilt but could nonetheless furnish a self-incriminating "link in the chain" if compelled to answer a particular question in court. Witnesses who deny ultimate culpability for the defendant's alleged offense should not be categorically denied access to the Fifth Amendment privilege.

The *Hoffman* case cited by the majority reinforces my view that the "reasonable cause" standard for asserting the privilege is not as the majority opinion suggests. In *Hoffman*, the United States Supreme Court noted that, "if the witness, upon interposing his claim [of privilege], were required to prove the hazard [of incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need *only* be evident from the *implications* of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result. *The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'* " (Emphasis added.) *Id.*, 341 U.S. at 486-487, 71 S. Ct. at 818, 95 L. Ed. at 1124, quoting *Ex parte Irvine* (S.D.Ohio 1896), 74 F. 954, 960.

In the case at bar, Batt had "reasonable cause" to assert the privilege against self-incrimination. Defense counsel's announced theory of the case was that Batt, not Reiner, was responsible not only for the alleged crime against Alex, but also for the uncharged injuries suffered by Alex's sibling. Given this, and given the statements by defense counsel warning the trial court that a grant of immunity would preclude a later trial against Batt for Alex's death, I agree with the trial court and the court of appeals that Batt's assertion of the Fifth Amendment privilege was amply supported by the "reasonable cause" *Hoffman* requires.

B. The Trial Court's Grant of Immunity

Having rejected Batt's entitlement to the privilege against

self-incrimination, the majority also concludes that "the wrongful grant of immunity resulted in serious prejudice to the defendant." To support this conclusion, the majority claims that, "when the court granted her immunity, *the court in effect was telling the jury that Susan Batt did not cause Alex's injuries*." (Emphasis added.)

Since the trial court's decision to grant or deny immunity under R.C. 2945.44 is reviewable only for an abuse of discretion, *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St. 3d 118, 119, 515 N.E.2d 914, 916, I would not reverse that decision on such speculative grounds. The majority claims that the grant of immunity "told" the jury that Batt was faultless. It is equally possible--if not more likely--that the jury would regard Batt as *less* credible, and a *more likely source* of Alex's injuries, after the trial court's grant of immunity. After all, a grant of immunity compels testimony from a witness who has something potentially *self-incriminating* to say. R.C. 2945.44(A). Regardless, I would not substitute this court's judgment for the trial court's on the basis of such speculation.

The majority also decides that, to further the administration of justice, "the jury should have been able to hear and evaluate *all* the evidence to decide whether someone other than Matthew Reiner was responsible for Alex's death." (Emphasis added.) I agree, but I fail to see how the trial court's grant of immunity to Batt here did anything to restrict the trial evidence. The jury heard Batt's immunized testimony. The trial court's grant of immunity did not immunize Batt from testifying--it "compelled the witness to answer." R.C. 2945.44(A).

Batt had reasonable cause to assert her Fifth Amendment privilege. The trial court did not abuse its discretion or prejudice Reiner in deciding to grant Batt transactional

immunity in compliance with R.C. 2945.44. Accordingly, I dissent from the majority's conclusion that the trial court's grant of immunity was erroneous, and would affirm the court of appeals' decision on this issue.

Court of Appeals of Ohio, Sixth District, Lucas County.

STATE of Ohio, Appellee,
v.
Matthew REINER, Appellant.

No. L-97-1002.

Dec. 18, 1998.

Julia R. Bates, prosecuting attorney, and J. Christopher Anderson, for appellee.

Samuel Z. Kaplan, Richard Walinski, Fritz Byers, and Robert Z. Kaplan, for appellant.

OPINION AND JUDGMENT ENTRY

SHERCK.

This appeal comes to us from the Lucas County Court of Common Pleas. There, following a jury trial, appellant was convicted of manslaughter in the "shaken baby" death of his two-month old son. Because prejudicial juror misconduct occurred during the course of the trial, we reverse appellant's conviction.

Appellant, Matthew Reiner, is an engineer. His wife, Dr. Deborah Reiner, is a dentist. The couple was already the parents of a two-year old daughter when, on June 15, 1995, Deborah Reiner delivered twins, Alex and Derek. Although slightly premature, both twins were healthy.

Following the birth of the twins, both parents took time off from work to care for them. Soon, however, they sought the services of a nanny. After a brief search, the couple hired Susan Batt; she began to work under Deborah Reiner's supervision on July 25, 1995. This arrangement continued until August 14, 1995, when Deborah Reiner returned to work. During the weekend of August 12, twin Alex took ill. On Sunday, August 13, his mother took him to an outpatient clinic. Deborah Reiner told the clinic doctor that Alex had vomited four times over the weekend. Alex had a temperature of one hundred two degrees at the time of his examination. The clinic doctor diagnosed Alex with probable gastroenteritis, recommending Tylenol and a fluid to prevent dehydration.

On August 16, 1995, both twins were examined by their regular pediatrician during a well-baby examination. The results for both were unremarkable. Deborah Reiner reported that Alex improved throughout the week and appeared to have recovered fully by the following Monday.

Wednesday, August 23, was Deborah Reiner's regular day off. That day, she cared for the children, later reporting that Alex seemed "achy" again, though he showed no signs of fever. On Friday, August 25, Susan Batt called Deborah Reiner to report that Alex was again vomiting. At Susan Batt's request, Deborah Reiner's mother helped care for the children on Friday afternoon. Over the weekend, Alex remained ill, throwing up, but still showing no signs of fever.

On Monday, when Deborah Reiner returned home from work, Susan Batt reported to her that Alex had eaten well and had slept for two five-hour periods. Susan Batt left the Reiner household between 5:30 and 6:00 p.m. Shortly thereafter, Deborah Reiner, concerned that Alex had slept so long, called a friend who was a Dayton emergency room physician. As the two spoke, the physician directed Deborah Reiner to examine Alex. The examination revealed nothing unusual, but the physician suggested that Reiner take Alex to a pediatrician the next day. Reiner reported that during the examination, Alex was taking a bottle.

Shortly after 6:30 p.m., Deborah Reiner's parents came to the home, returning Reiner's two-year old who had spent the day with them. Her parents remained there until 7:30 p.m., when appellant came home. At 9:00 p.m., Alex again vomited. At approximately 10:30 p.m., appellant put both twins to bed; the Reiners then prepared to go to bed themselves. According to appellant, Alex was whimpering when appellant and his wife lay down. Volunteering to comfort the child, appellant then took Alex from his bed to a downstairs room and placed Alex face down on his chest. Appellant stated that Alex could not get comfortable. After

about a half hour, Alex's breathing became strained and he became unresponsive. Appellant then took the child to his bedroom, awakened his wife and called 911.

During the call to 911, appellant reported Alex's color as ashen and that he did not appear to be breathing. The emergency services operator directed the Reiners to perform CPR until emergency medical technicians arrived. Moments later, when the EMTs arrived, they found Alex without a pulse or respiration and with blue skin. They transported Alex to a nearby hospital where he was placed on a respirator. An initial EEG, however, showed no brain activity. Approximately two days later, after a second EEG showed a "flat line", Alex was declared brain dead and removed from life support.

An autopsy conducted by Lucas County Coroner Dr. James Patrick revealed retinal hemorrhages in both eyes, extensive subdural and subarachnoid bleeding, and massive brain swelling. The examination also revealed evidence of an earlier cerebral hemorrhage. The coroner concluded that Alex suffered from "shaken baby syndrome"--the result of child abuse. Dr. Patrick set the time of injury as the evening of Monday, August 28, 1995. Patrick estimated that Alex was shaken within no more than three hours of his respiratory arrest and, in all likelihood, within minutes of the onset of the arrest.

On Dr. Patrick's testimony and appellant's admission that he alone was with Alex during the critical time, a Lucas County Grand Jury indicted appellant on a single count of involuntary manslaughter. Appellant pled not guilty and the matter proceeded to a jury trial.

At trial, appellant did not contest the fact that Alex was a victim of shaken baby syndrome or that he was alone with Alex for the half hour immediately before his collapse. Instead, the defense relied on medical testimony contradicting Dr. Patrick's opinion concerning the timing of the injury.

Appellant's experts testified that, if the cessation of Alex's respiratory function was the result of pressure caused by cerebral edema (brain swelling), the triggering event could have occurred several hours before the respiratory arrest. The significance of this was that the injury could have occurred during the day while Alex was in the care of Susan Batt. Batt, they pointed out, had declined to testify at prior hearings on grounds that she might incriminate herself.

However, at trial, the state asked for and the trial court granted Susan Batt immunity from prosecution. Under such immunity, Batt denied any involvement with Alex Reiner's death.

On deliberation, the jury found appellant guilty as charged. The trial court denied a defense motion for a judgment of acquittal or a new trial. Ultimately, the court sentenced appellant to an indefinite period of incarceration of five to twenty-five years. However, this sentence was suspended and appellant was placed on five years probation.

Appellant now appeals his conviction, setting forth the following nine assignments of error:

"1. The verdict is contrary to the evidence's manifest weight.

"2. The trial curt committed prejudicial error by granting immunity to a witness who had no claim of Fifth-Amendment privilege because her self- exonerating testimony would not tend to incriminate her.
*3 "3. The trial court committed prejudicial error by not granting defendant's motion for new trial on the ground of prosecutorial misconduct involving the State's improper request for immunity for Susan Batt to procure her testimony, despite the prosecutor's knowledge that Batt was not entitled to such immunity.
"4. The trial court committed prejudicial error by refusing to strike the opinions about axonal shearing being the mechanism that caused the respiratory arrest and eventual death of Alex Reiner.
"5. The trial court committed prejudicial [sic] failing to permit the defendant to prove the fact and content of the prior inconsistent statement of the Lucas County Coroner during his grand jury testimony.
"6. The trial court committed prejudicial error in refusing to strike the opinion of the State's expert witness Dr. Elizabeth K. Balraj, M.D. whose opinion regarding a causative event was expressed in terms of mere possibility, not probability.
"7. The court committed reversible error in refusing to give the instruction proposed by the defense on the permissible inference to be drawn from Susan Batt's silence in the face of an accusation of guilt.
"8. The trial court committed prejudicial error in refusing to grant defendant's motion for judgment of acquittal at the close of the state's case- in-chief.
"9. The trial court committed prejudicial error by not granting defendant's motion for a new trial on the ground of juror misconduct."

We shall reserve discussion of appellant's first assignment of error until later.

I.

In his second and third assignments of error, appellant attacks the trial court's decision to grant Susan Batt immunity. Appellant suggests that the trial court's decision to grant immunity was unlawful and that the state committed prosecutorial misconduct when it requested the grant.

In Ohio, a trial court's authority to grant immunity is derived solely from statute. *State ex rel. Leis v. Outcalt* (1982), 1 Ohio St.3d 147, 148, 438 N.E.2d 443. R.C. 2945.44 provides:

"(A) In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:

"(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;

"(2) The court of common pleas informs the witness that by answering, or producing the information he will receive

immunity under division (B) of this section.
"(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he gave an answer or produced any information.
"(C) A witness granted immunity under this section may be subjected to a criminal penalty for any violation of section 2921.11, 2921.12, or 2921.13 of the Revised Code, or for contempt committed in answering, failing to answer, or failing to produce information in compliance with the order."

Appellant argues that even if immunity is requested by the prosecuting attorney pursuant to R.C. 2945.44(A)(1) and even if the trial court, pursuant to section (A), concludes that the testimony furthers the administration of justice, section (B) demands a threshold determination as to whether the claim of privilege is valid. In support of this position, appellant cites *State v. Landrum* (1990), 53 Ohio St.3d 107, 120, 559 N.E.2d 710; *McGorray v. Sutter* (1909), 80 Ohio St. 400, 89 N.E. 10, paragraph two of the syllabus *and State v. Jenkins* (1984), 15 Ohio St.3d 164, 228, 473 N.E.2d 264. No valid privilege existed for Susan Batt, according to appellant, because the state indicated that it had no intention of prosecuting her, the prosecutor believed the testimony she would give would only serve to exonerate her, and the assertion of the privilege was only on "advice of counsel." The privilege, appellant insists, is only available when a

witness has a "real and appreciable" fear of incrimination and prosecution. See *Jenkins* at 228, 473 N.E.2d 264.

We agree with appellant that the language of R.C. 2945.44(B) implies that a trial court make some determination of the validity of the privilege against self-incrimination antecedent to a grant of statutory immunity. "The witness's claim alone is not adequate." *Landrum* at 120, 559 N.E.2d 710. We cannot, however, agree with appellant that such a determination must be the result of a formal procedure or must be patent. It is sufficient that the record contains information by which, " * * * the trial court could conclude that it did not clearly appear that the witness was mistaken in claiming the Fifth Amendment privilege." *Landrum* at 121, 559 N.E.2d 710, citing *Hoffman v. United States* (1951), 341 U.S. 479, 484, 71 S.Ct. 814, 95 L.Ed. 1118. Furthermore, we cannot examine the trial court's decision on this matter using information which was not before the court when it made its ruling, as it would be fundamentally unfair to find error based on hindsight.

In beginning our review of the trial court's handling of this matter, we initially note that Susan Batt's lack of culpability was not raised at trial; in fact, quite the opposite contention was rigorously asserted. Before the bench, the focus of appellant's argument was whether granting Ms. Batt immunity would "further the administration of justice."

The trial court was aware that the defense, in its opening statement, sought to blame Ms. Batt for Alex's death. Attorneys for the defense, an attorney representing Deborah Reiner, and the guardian ad litem for the children argued that granting Susan Batt transactional immunity would preclude

her later trial for Alex's death. Given this, it was certainly understandable that Susan Batt's counsel would advise her to exercise her right to make no statements which might tend to incriminate her. Furthermore, the court had no knowledge at this point as to what evidence the defense possessed implicating Susan Batt. Likewise, even if as anticipated, Susan Batt denied culpability in Alex's death, it was not clear what inculpatory statements she might make when challenged during cross-examination. Under these circumstances, we conclude that when the trial court rendered its decision, it did not clearly appear that Susan Batt's assertion of her Fifth Amendment right against self-incrimination was mistaken. Accordingly, appellant's second assignment of error is not well- taken.

Similarly, since the state was aware of no information the defense might possess inculpating Susan Batt, the prosecution was guilty of no misconduct in requesting immunity. Accordingly, appellant's third assignment of error is also not well-taken.

II.

In his fourth assignment of error, appellant complains that the trial court erred in denying his motion to strike certain expert testimony which indicated that axonal shearing was the cause of Alex Reiner's death.

Both sides agreed that Alex was the victim of "shaken baby syndrome." Coroner Patrick testified that muscular development in infants is not great and brain tissue is soft. When shaken, the baby's head will " * * * flop all the way back." Inside the baby's head during such shaking, the brain

and the skull, " * * * get out of phase." Given sufficient force, this can cause tearing of the blood vessels which connect the brain to the "dura" which surrounds it. The same forces act on the eyes to cause retinal hemorrhages.

In some circumstances, violent shaking can shear, what Dr. Patrick characterized as, " * * * the circuits that control * * * breathing and consciousness * * *." This can result in death. Other witnesses termed such disruption as axonal shearing (referring to axons which conduct nerve impulses away from cells).

The critical issue at trial was the amount of time between the trauma and the respiratory arrest. Experts from both the state and the defense agreed that when shearing occurs in that portion of the brain which controls respiratory function, arrest would be nearly immediate. Appellant, by his own admission, was the only person with Alex during the last half hour before respiratory arrest. An immediate arrest would, therefore, be inculpatory to him.

Alternatively, if arrest was the result of cerebral edema (swelling of the brain), the process could have taken several hours between the infliction of the trauma and the respiratory arrest. If this was the case, persons other than appellant, including babysitter Susan Batt, could not be excluded because of a lack of opportunity.

Coroner Patrick testified that his autopsy of Alex Reiner revealed hemorrhages in both retinas, massive bleeding below the dura and diffuse bleeding below the arachnoid (surface of the brain). Additionally, Dr. Patrick microscopically examined tissue taken from Alex Reiner's

brain; this examination showed damage to the brain cells themselves. As a result, the coroner concluded that Alex's injuries were massive and that the onset of respiratory arrest would have been sudden. Patrick opined that arrest would have likely been immediate, but certainly no more than three hours after the injury. This opinion was supported by the testimony of the Cuyahoga county coroner and a deputy coroner from Franklin county who testified for the state in the case.

In contrast, the defense called medical experts who testified that the brain's respiratory function was located in its stem and that a determination of axonal shearing affecting the respiratory system could not be certain absent tissue samples from this area. No such samples were taken in this case. Citing Evid.R. 702 and *Daubert v. Merrell Dow* (1993), 509 U.S. 590, 593, the defense moved to strike testimony concerning axonal shearing as a cause of death, arguing that, without tissue slides of the brain stem, a conclusion that Alex Reiner died of axonal shearing was not objectively verifiable as demanded by Evid.R. 702(C)(1). The trial court rejected this motion.

Evid.R. 702 permits a witness to testify as an expert if (1) the topic of the testimony is beyond the experience or knowledge of a lay person, Evid.R. 702(A); (2) the witness has specialized knowledge concerning the topic, Evid.R. 702(B); and (3) the testimony is based on reliable scientific, technical or other specialized knowledge. Evid.R. 702(C). A procedure, test or experiment is "reliable" only if:

> "(C)(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or

principles;
"(2) The design of the procedure, test, or experiment reliably implements the theory;
"(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

The trial court acts as the "gatekeeper" of scientific and technical information which may be presented to a jury. The court, in its discretion, must make a threshold determination whether scientific or technical testimony meets the Evid.R. 702(C)(1) through (3) criteria. *Franks v. Lopez* (1997), 121 Ohio App.3d 523, 529, 700 N.E.2d 385, citing *State v. Pierce* (1992), 64 Ohio St.3d 490, 494, 597 N.E.2d 107.

In this matter, the expertise of Dr. Patrick and the other two county coroners is unchallenged. Each testified that the massive trauma to Alex Reiner's brain would have led to an almost immediate unconsciousness and respiratory arrest. Dr. Patrick explained the engine for this distress, in lay terms, as a disruption of the electrical circuits of the brain which control breathing. The other two coroners used the phrase "axonal shearing." The three agreed that this disruption or shearing could be reasonably inferred from the evidence admitted.

Arrayed against this testimony was that of three defense medical experts. They testified that the preferred method of diagnosing axonal shearing involving the respiratory function was to examine a tissue slide from the brain stem. None of these witnesses testified that axonal shearing could not be diagnosed without brain stem tissue slides and only one defense expert testified that she, personally, would not diagnose axonal shearing in the brain stem without a tissue

sample from that area.

The testimony of Dr. Patrick and two other forensic pathologists that the evidence admitted was sufficient to establish the time of death within the parameters set forth demonstrates that Dr. Patrick's conclusion was at once reliable and independently verifiable. Therefore, the trial court properly determined that the defense's challenges to the lack of brain stem samples went to weight rather than admissibility. Consequently, the trial court did not abuse its discretion in denying appellant's motion to strike. Accordingly, appellant's fourth assignment of error is not well-taken.

III.

Appellant's fifth and sixth assignments of error challenge certain trial court evidentiary rulings. In his fifth assignment of error, appellant contends he was prejudiced by the trial court's denial of his motion to admit Dr. Patrick's grand jury testimony into evidence as a prior inconsistent statement. In his sixth assignment of error, he asserts that the trial court erred by refusing to strike certain testimony by a state's expert.

Rulings on the admission of evidence during trial rests in the sound discretion of the court and will not be reversed absent an abuse of that discretion. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, 473 N.E.2d 768. An abuse of discretion is more than an error of law orof judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. Long* (1978), 53 Ohio St.2d 91, 98, 372 N.E.2d 804.

At trial, the defense cross-examined Dr. Patrick extensively concerning his grand jury testimony. The defense characterized his testimony there as being that swelling in the brain was the cause of Alex Reiner's loss of consciousness and respiratory arrest. Dr. Patrick conceded that he had told the grand jury that edema played a part in Alex's arrest and loss of consciousness. On redirect, Dr. Patrick stated that he had also testified to the grand jury about his conclusion that the "circuits of the brain" were disrupted and that served as a contributory factor in Alex's death. Later, appellant sought to introduce a portion of Dr. Patrick's grand jury testimony as a prior inconsistent statement. Appellant maintains the trial court erred in denying introduction of this evidence.

Evid.R. 613(B) sets the foundational requirements for the introduction of a witness's prior inconsistent statements:

> "(1) the witness is presented with the former statement; (2) the witness is asked whether he made the statement; (3) the witness is given an opportunity to admit, deny or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement." *State v. Mack* (1995), 73 Ohio St.3d 502, 515, 653 N.E.2d 329, citing *State v. Theuring* (1988), 46 Ohio App.3d 152, 155, 546 N.E.2d 436.

Additionally, Ohio continues to follow the common law rule that the inconsistent statement itself is not admissible if the witness admits making such a statement. *Id.; State v. Johnson* (1983), 10 Ohio App.3d 14, 17, 460 N.E.2d 625.

Here, Dr. Patrick admitted making the statements before the grand jury which appellant alleged were inconsistent.

Therefore, the trial court did not abuse its discretion in refusing to admit into evidence the statement itself. Accordingly, appellant's fifth assignment of error is not well-taken.

Appellant also alleges that the trial court should have struck the testimony of Cuyahoga County Coroner Dr. Elizabeth Balraj concerning the timing of Alex Reiner's collapse as not having been testified to as "probable." This allegation, however, is factually incorrect. A hypothetical question was directed to Dr. Balraj who was asked, given the facts assumed, if she could state an opinion "to a reasonable degree of medical certainty." She responded that she could and proceeded to give her opinion.

Dr. Balraj testified that the type of injuries Alex sustained and the other information provided "is consistent with the child sustaining injury sometime between 10:30 p.m. and 11:00 p.m." The fact that she used the word "consistent" rather than "probable" is not fatal when her testimony is taken in context. *Ulmer v. Ackerman* (1993), 87 Ohio App.3d 137, 144, 621 N.E.2d 1315. In any event, this testimony was cumulative and any misstatement would be harmless beyond a reasonable doubt. Accordingly, appellant's sixth assignment of error is not well-taken.

IV.

Admitted at trial was an account of a confrontation between Deborah Reiner and Susan Batt which occurred after a juvenile court hearing. During the juvenile court hearing, Batt invoked her Fifth Amendment privilege and refused to

answer questions concerning Alex Reiner's death. She exercised this right on the advice of counsel. Following the hearing, Deborah Reiner confronted Susan Batt and asked her, "if she did it on purpose or if it was an accident." Susan Batt said nothing and walked away.

The defense characterized this encounter as a tacit admission of guilt by Susan Batt and requested a jury instruction to the effect that Susan Batt'ssilence under these circumstances gave rise to a permissible inference that this was an admission of guilt or, alternatively, could be considered in assessing Susan Batt's credibility. The trial court refused to include appellant's proposed instruction and appellant now suggests that this constituted error.

If requested, at least in substance, special instructions to a jury must be included in the charge if they are correct statements of law, pertinent and timely provided. *State v. Epperson* (1969), 20 Ohio St.2d 59, 253 N.E.2d 785, paragraph one of the syllabus, overruled on other grounds *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965; *State v. Guster* (1981), 66 Ohio St.2d 266, 269-270, 421 N.E.2d 157, citing *State v. Matthew* (1976), 47 Ohio St.2d 119, 121, 351 N.E.2d 98.

Appellant asserts that Ohio recognizes admissions by silence when one fails to speak under circumstances when that person would naturally be expected to deny. However, appellee properly points out that Evid.R. 801(D)(2)(b), which is the authority appellant cited to the trial court as legal justification for this instruction, applies only to a party opponent. See Staff Notes to Evid.R. 801(D)(1). Appellant

presents no authority to rebut this.1 However, in his reply brief, appellant insists that the instruction would still be appropriate under Evid.R. 613(B) as a prior inconsistent statement of a witness. In this regard, appellant confuses the admissibility of inconsistent statements for impeachment and his right to such an instruction. The account of Susan Batt's silence in the face of accusation was admitted. However, no special instruction was necessary because, as impeachment material, the incident was substantially covered by the general charge on the assessment of credibility of witnesses. Therefore, the trial court acted within its discretion in denying appellant's request for the special instruction. Accordingly, appellant's seventh assignment of error is not well-taken.

V.

In his eighth assignment of error, appellant contends that the trial court erred in overruling his motion for a judgment of acquittal at the close of the state's case-in-chief. Appellant argues that had the trial court excluded Dr. Patrick's testimony (which gave the cause and time frame of Alex's respiratory arrest), the state would not have made a prima facie case and the motion pursuant to Crim.R. 29 should have been granted. See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

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1 The cases appellant cites invariably involve tacit admissions by a party or the agent of a party. *State v. Matthew*, supra (defendant); *United States Battery Service Co. v. Union* (1930), 8 Ohio L. Abs. 733 (agent of defendant); *State v. Jackson* (1951), 112 N.E.2d 80, 64 Ohio L. Abs. 413 (defendant); *Dietz v. Chandler* (1934), 56 N.E.2d 937, 40 Ohio L. Abs. 10 (defendant); *Reams v. State ex rel. Favors* (1936), 53 Ohio App. 19, 4 N.E.2d 151 (defendant).

Appellant is correct. Had Dr. Patrick's testimony and that of the other state experts been stricken, appellant would have been entitled to a judgment of acquittal. However, the court acted properly in not striking the testimony, as we previously discussed in our consideration of Assignment of Error No. 4. Therefore, appellant was not entitled to have his Crim.R. 29 motion sustained. Accordingly, his eighth assignment of error is not well-taken.

VI.

Appellant's ninth assignment of error arises out of the activities of an alternate juror prior to the submission of the case to the jury. Against the specific and repeated instruction of the court, one of the alternate jurors engaged several other members of the panel in conversation concerning the credibility of witnesses, lobbied for acquittal, commented on defense counsel and reported rumors of the amount they were paid.

Sometime after the trial and verdict, this alternate juror came to the defense and executed an affidavit concerning his activity during the trial. Appellant submitted this affidavit to the court along with a motion for a new trial based on juror misconduct; the court ordered a full hearing. Each of the jurors who deliberated were called and asked about the activities of the alternate juror. Some confirmed the alternate juror's improper conduct. All denied that they had been in any way influenced by that conduct during their deliberations. On this testimony, the trial court overruled appellant's motion for a new trial. This, appellant insists, was prejudicial error.

The axiom, a jury may not impeach its own verdict, is founded in a number of public policies including:

" * * * '(1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; and (5) maintaining the viability of the jury as a judicial decision- making body.' " *State v. Rudge* (1993), 89 Ohio App.3d 429, 438, 624 N.E.2d 1069, quoting *State v. Shillcut* (1984), 119 Wis.2d 788, 794, 350 N.W.2d 686.

The modern incarnation of the axiom is found in Evid.R. 606(B) which relates to the competency of a juror as a witness. The rule provides:

"(B) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes."

The section of the rule which requires outside evidence antecedent to an inquiry of jurors concerning extraneous prejudicial information or influence received during deliberations is the codification of the "aliunde rule" which has long been the law of Ohio. *Wicker v. City of Cleveland* (1984), 150 Ohio St. 434, 83 N.E.2d 56, syllabus; *Farrer v. State of Ohio* (1853), 2 Ohio St. 54, syllabus. Before the trial court and on appeal, the state argued no inquiry could be made of the jurors here because the alternate juror's affidavit was insufficient to satisfy the threshold of the rule. Appellant responded citing *State v. Rudge*, *supra*, at 437, 624 N.E.2d 1069, for the proposition that an alternate juror who does not take part in deliberations is not a "member of the jury" for purposes of the aliunde rule or, alternatively, that Evid.R. 606(B) was inapplicable.

In its written decision on the motion for a new trial, the trial court announced that it had weighed these arguments and found Rudge unpersuasive. For this reason, the court concluded that it should not have made any inquiry to the jurors as to the alternate juror's remarks. Additionally, the court found that, even if the alternate juror's affidavit did satisfy the aliunde rule, the inquiry to jurors about the alternative juror's conduct revealed nothing prejudicial to appellant. Consequently, the court denied appellant's motion.

As the trial court noted, juror misconduct alone is not sufficient to prejudice a defendant. *Rudge* at 442, 624 N.E.2d 1069; *Irvin v. Dowd* (1961), 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751. The misconduct must be of such a nature that the impartiality of the jury is drawn into question. What we believe is the proper analysis is stated in

Rudge, at 439, 624 N.E.2d 1069, quoting *State v. LaRue* (1986), 68 Hawaii 575, 579. Referring to Hawaii Evid.R. 606, that court stated:
"[w]e cannot consider the jurors' statement as to the effect of the improper statement upon them. We can only consider whether such a statement was made * * * and whether, given the statement, we can say that appellant had a trial before an impartial jury."

The trial court erred in rejecting *State v. Rudge, supra.* Rudge holds that the purpose of the aliunde rule and Evid.R. 606(B) is to maintain the sanctity of the jury room and the deliberations therein. *Id.* at 439, 624 N.E.2d 1069. Whether we adhere to the view that, procedurally, an alternative juror is not a part of the jury for purposes of the aliunde rule or that any occurrences outside the deliberative processes may be evidence aliunde of impropriety, *id.* at 442-443, 624 N.E.2d 1069, we believe that the affidavit of the alternative juror in the instant case was outside evidence of extraneous prejudicial information improperly brought to the jury's attention.2 Consequently, the trial court acted properly in the first instance by deciding to go forward with an inquiry but erred in the second instance when it determined that inquiry was inappropriate.

More troublesome, however, is the trial court's ancillary ruling that the inquiry failed to reveal that the alternative

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2 We reject the view that Evid.R.606(B) is inapplicable here. In *Rudge*, the "hang him now" statement was made by a juror who deliberated the defendant's guilt. Here the untoward remarks came from an alternate juror who did not deliberate. While the rule may not apply to clearly prejudicial statements made by a juror prior to deliberations, it must be applied in this case, where it was not known if the alternate's improper remarks were heard by jurors.

juror's activities resulted in prejudice to appellant. The court premised this conclusion on its determination that most of the alternative juror's remarks were favorable to appellant.

A criminal defendant is entitled to be judged by an impartial and disinterested jury. *Irvin v. Dowd, supra*, at 722. It follows that any event which tends to negate the jury's impartiality or disinterestedness operates to the defendant's prejudice. State v. Rudge provides form for our analysis, but not a direct answer. In Rudge, the trial court declared a mistrial based on testimony from some jurors that prior to opening statements one of their number had said of the capital murder defendant: "We could save a lot of time and money and just hang him now." On this remark, the appeals court concluded that the trial court's decision to grant a mistrial was within its discretion.

Our case is not as clear cut. The attitude expressed by the *Rudge* juror clearly does not exhibit impartiality. Here, the majority of the alternative juror's improper statements did favor appellant. The only information he imparted which might be considered negative to appellant was: 1) his commenting favorably on Dr. Patrick's testimony; 2) his conveying a rumor that the Reiners were paying their defense team $100,000 and; 3)his disclosure that defense attorney Robert Kaplan was such a "klutz" that he once required medical attention for hitting himself in the face with a tennis racket.

In analyzing the alternative juror's remarks, we must first look at the nature of the statements, and then, without considering the effect of these remarks on the other jurors' deliberations, decide whether or not we can say with any

certainty that the defendant was afforded his Sixth Amendment right to an impartial jury. *Rudge* at 439, 624 N.E.2d 1069.

On its face, the most damaging comment made by the alternate juror was his initial remark that bolstered the credibility of Dr. Patrick. Since the state's case rises or falls on the coroner's testimony, any comment directed to this area of evidence must be received with a critical eye.

However, when viewed in the factual context of this trial, the alternate juror's comments which favored the defense were, in our view, injurious to appellant's cause. This is so because of the way these comments folded into the course of the proceedings. First, during voir dire, the alternate juror revealed that he knew of Attorney Robert Kaplan; specifically, he stated that he had seen Kaplan at the tennis club. Second, the defense team in this case elected to employ a "no holds barred" attack, frequently objecting to the proceedings. Third, the case pitted the testimony of the medical examiners against the testimony of the hired defense experts. Fourth, the alternate juror then told other jurors that the defense team was charging $100,000 for the trial. When the alternate found out that he would not be allowed to deliberate with other members of the panel, he announced that the verdict would have to be not guilty. Finally, when the individual jurors were later questioned at the post trial hearing, one of them expressed to the court incredulity and outright displeasure that the alternate was left on the panel and not disqualified because of his knowledge of Kaplan. One of the jurors even voiced suspicion that the alternate juror was a defense "plant."

Given this factual setting, we glimpse a jury that: 1) knows the alternate is acquainted with one of the defense lawyers, 2) witnesses an aggressive three member defense team belabor minute points of evidence, 3) is told by the alternate that the trial is costing the defendant $100,000 and their verdict can only be not guilty, 4) is going to have to determine the credibility of the defense expert, and 5) suspects (at least, one of the members does) that the defense may have been successful in "planting" the alternate. In this climate, we look upon the alternate juror's report of hefty defense fees with great concern. Under the circumstances, such a report might well have been interpreted by the jury as a defense attempt to "buy" an acquittal.3 Furthermore, such overt partisanship, coupled with the alternate juror's prolonged improper conduct, could have (and did in the case of one of the jurors) arouse a negative reaction from the jury.

Of particular concern to us, however, is the failure of the jurors to abide by the court's instructions. Jurors were repeatedly instructed not to discuss the case with anyone, including each other, until it was submitted to them for deliberation. In addition, the jury was repeatedly instructed that should anyone attempt to discuss the case with them, it should be immediately reported to the court.

The testimony from at least four jurors demonstrated that the alternative juror had on numerous occasions violated the

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3 At the postconviction hearing,attorney, Fritz Byers, represented to the court that appellant's total legal fees were $ 26,500. These were the fees of attorney Samuel Z. Kaplan. According to Byers, he, Richard Walinski, and Robert Kaplan volunteered their service.

court's instruction. If the testimony of the alternative juror is to be credited, even more than these four jurors may have been involved. Yet none of these jurors followed the court's instruction to report such misconduct. This nonfeasance, while passive in nature, is nevertheless misconduct on the part of the other individual jurors. It supports the strong suspicion that the panel was tainted by the alternate juror's misconduct. Therefore, we can no longer say with certitude that appellant's trial was before an impartial and disinterested jury. This, by definition, is prejudicial to appellant. Accordingly, his ninth assignment of error is found well-taken.

VII.

We have reserved our discussion of appellant's first assignment of error until now. Appellant asserts his conviction was against the manifest weight of the evidence.

The concept of manifest weight of the evidence is distinguished from an examination of the sufficiency of the evidence, see *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. When an appellate court examines a case to determine whether a verdict is against the manifest weight of the evidence, the court sits as the "thirteenth juror." In order for an appellate court to reverse the judgment on this basis, it must disagree with the fact finder's resolution of conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. This by no means allows the reviewing court to lightly substitute its judgment for that of the jury. Reversal may only be had when:

"The court, reviewing the entire record, weighs the

> evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.* quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

In the present case, the only real issue in dispute is the amount of time elapsed between the trauma inflicted to Alex Reiner and his respiratory arrest. Dr. Patrick, supported by two other board certified pathologists, testified that this period was from almost no time at all to a maximum of three hours. During this time frame, Alex was either in the company of both of his parents, or with appellant alone. Appellant concedes he was alone with Alex during the half hour immediately preceding arrest--the time during which the state's experts testified injury most likely occurred.

In contradistinction, the defense experts hypothesized that if Alex's respiratory arrest resulted from edema rather than axonal shearing, the period of time could have been longer--long enough so that some other party, specifically Susan Batt, could have shaken him.

The experts on both sides of this matter hold impressive credentials. We cannot say one side presented testimony which was inherently more believable or more persuasive. Given this, we cannot say that the jury clearly lost its way or that a manifest miscarriage of justice resulted. Therefore, we

conclude that the verdict was not against the manifest weight of the evidence. Accordingly, appellant's final assignment of error is not well-taken.

On consideration whereof, the judgment of the Lucas County Court to Common Pleas is reversed. This case is remanded for further proceedings consistent with this opinion. Costs to appellee.

JUDGMENT REVERSED.

SHERCK, and EVANS, JJ., concur. HANDWORK, P.J., dissents and writes separately.

HANDWORK, P.J., dissenting.

For the reasons stated below, I respectfully dissent from the majority's analysis and resolution of appellant's ninth assignment of error and would affirm the trial court's denial of appellant's motion for a new trial.

It is well established that a trial court's denial of a motion for new trial will not be reversed on appeal absent an abuse of discretion under the facts and circumstances of the case. *Toledo v. Stuart* (1983), 11 Ohio App.3d 292; *McDonald v. Akron* (1993), 86 Ohio App.3d 209, 210-211; *Apaydin v. Cleveland Clinic Found.* (1995), 105 Ohio App.3d 149, 152. The Ohio Supreme Court has repeatedly held that an abuse of discretion involves more than an error of law or judgment and to warrant reversal the trial court's action must be arbitrary, unreasonable or unconscionable. *Berk v. Matthews*

(1990), 53 Ohio St.3d 161, 169. An appellate court is not free to substitute its judgment for that of the trial judge. *Id.; State v. Taylor* (1991), 73 Ohio App.3d 827, 833. Reviewing courts should defer to the trial court which had the opportunity to hear and observe the demeanor of those testifying and should defer to the trial court's judgment concerning the credibility of jurors. *Id.* "[F]indings of impartiality should be set aside only where prejudice is 'manifest.' " *Irwin v. Dowd* (1960), 366 U.S. 717, 724.

In *State v. Phillips* (1995), 74 Ohio St.3d 72, 88, the Ohio Supreme Court stated:

"When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror. *Smith v. Phillips* (1982), 455 U.S. 209, 215-216; *Remmer v. United States* (1954), 347 U.S. 227, 229-230. 'In a criminal case, any private communication * * * with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial * * *. [T]he burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.' *Id.* The Sixth Circuit, however, has held that the defense must prove that the juror has been biased. *United States v. Zelinka* (C.A.6, 1988), 862 F.2d 92, 95, citing *Smith v. Phillips, supra* 1; *contra United States v. Littlefield* (C.A.9,

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1 In *Zelinka*, the Sixth Circuit analyzed the Supreme Court's discussion in *Smith v. Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78, and quoted the following: " 'This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.' *Id.* at 215." 862 F.2d at 95.
The Sixth Circuit then stated:

1985), 752 F.2d 1429, 1431. In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror. See *United States v. Daniels* (C.A.6, 1976), 528 F.2d 705, 709-710; *United States v. Williams* (C.A.D.C.1987), 822 F.2d 1174, 1189; Annotation (1992), 3 A.L.R.5th 963, 971, Section 2." (Parallel cites omitted.)

"This court has consistently held that *Smith v. Phillips* reinterpreted Remmer to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless. In *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir.1984), cert. denied, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985), this court interpreted *Smith v. Phillips* as holding that *Remmer* does not govern the question of the burden of proof where potential jury partiality is alleged. Instead, *Remmer* only controls the question of how the district court should proceed where such allegations are made * * *. In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed." *Id.*

The Sixth Circuit then listed two other cases in which it had reiterated its interpretation of Smith v. Phillips as well as a First Circuit case which also followed its interpretation and two federal appellate courts which have not followed its interpretation.

See, also, *State v. Johnson* (Jan. 16, 1997), Cuyahoga App. No. 70234, unreported, in which the appellate court cited *State v. Phillips* in holding that the defense must prove that a juror was biased.2

In *State v. Phillips*, the defendant had argued on appeal that he had been denied the right to trial by an impartial jury because, during a trial recess, five of the jurors had been spoken to by a member of a grand jury panel about the defendant's case. 74 Ohio St.3d at 88. The jurors reported the comments to the court's staff and the trial court held a hearing after which he concluded that the jurors would not consider the comments made to them.3 *Id.* In discussing jury impartiality, the Ohio Supreme Court stated that "A juror's belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court," citing *Smith v. Phillips, supra,* 455 U.S. at 217, fn. 7; 4 *Zelinka, supra,* 862

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2 Although *in State v. Hart* (1988), 57 Ohio App.3d 4, 8, 566 N.E.2d 174, I voted with the majority in finding that the burden was on the prosecution to prove juror misconduct was harmless, I believe in light of the Ohio Supreme Court's reliance on Zelinka in State v. Phillips, supra, the burden is appropriately placed on the defendant.

3 Although the jurors' actions in the Phillips case, i.e. leaving the area when the grand juror began speaking to them and reporting the contact to the bailiff, differ from the facts in the case sub judice, I believe that the focus should be upon the ability of the jurors to be fair and impartial.

4 In fn. 7, the United States Supreme Court stated:
"Respondent correctly notes that determinations made in *Remmer*-type hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. As we said in *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), '[one] may not know or altogether understand the

F.2d at 95-96. *Id.* at 89.

In *State v. Lewis* (1993), 67 Ohio St.3d 200, 207, the defendant also argued that he had been denied his right to a fair trial by an impartial jury because of improper communication to the jury when an alternate juror told several other jurors about the victim's brother-in-law speaking to her during an adjournment. When the trial court conducted a voir dire of all the jurors to determine whether the incident had affected their ability to be fair and impartial, all jurors denied that the incident had affected their ability to be fair and impartial. *Id.* In holding that the defendant had failed to show that he had been denied his right to a fair trial, the Ohio Supreme Court stated:

> "*In State v. Hipkins* (1982), 69 Ohio St.2d 80, 83, this court held, 'A new trial may be granted for the misconduct of the jury where the substantial rights of the defendant have been materially affected. R.C. 2945.79(B); *Weis v. State* (1872), 22 Ohio St. 486. * * * Conversations by a third person with a juror during the progress of a trial for the purpose of influencing the verdict may invalidate the verdict, but where there is nothing in the record to demonstrate that the decision might have been influenced by such conversation, the refusal of the trial court to grant a new trial will not be disturbed. *State v. Higgins* (1942), 70 Ohio App. 383.' (Parallel cites omitted.)
> "Alternate juror Barr did not participate in the jury deliberations in the guilt phase or the penalty phase.

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imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.' *Id.*, at 171. See also *United States v. Reid*, 12 How. 361, 366, 13 L.Ed. 1023 (1852)."

> Appellant has not demonstrated how he was prejudiced by this contact with an alternate juror. The trial court negated any showing of prejudice by interrogating this alternate juror and conducting a voir dire of the remaining jurors. * * * " *Id.* (Emphasis added.)

In *State v. Kehn* (1977), 50 Ohio St.2d 11, 18-19, the Ohio Supreme Court reversed the court of appeals and held that the trial court did not err in denying a motion for a new trial on grounds of jury misconduct. In *Kehn*, after the trial, the jury foreman sent the trial judge an extensive trial notebook, containing detailed testimony digests, charts, points of law (some incorrect), and even philosophical phrases. *Id.* After he received the notes, the trial judge notified all parties and all members of the jury of his receipt of the notes, and held a hearing to determine if the notes had an influence on the verdict. *Id.* Each juror stated that his verdict was in no way influenced by the notes. *Id.* at 19. After opining that such a detailed set of notes in the judge's possession constituted more than a juror's admission or testimony as to possible misconduct and, thus, constituted evidence aliunde and suggested the possibility of prejudice, the Ohio Supreme Court stated:

"Each juror stated that his verdict was in no way influenced by the notes. No prejudice to appellants was affirmatively demonstrated. It is a long- standing rule of this court that we will not reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown. *Armleder v. Lieberman* (1877), 33 Ohio St. 77. We find that the trial court did not err in denying a new trial, and overrule this proposition of law." at 18-19.

Based on a review of the record in accordance with the

above law, I do not believe that reversal in this case is warranted as appellant has failed to demonstrate the trial court abused its discretion in denying his motion for a new trial.

90 Ohio St. 3d 1419; 735 N.E.2d 457;
2000 Ohio LEXIS 2442

99-239 and 99-427.

SUPREME COURT OF OHIO

90 Ohio St. 3d 1419; 735 N.E.2d 457; 2000 Ohio LEXIS 2442

September 20, 2000, Decided
NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:

Lucas App. No. L-97-1002. Reported at 89 Ohio St. 3d 342, 731 N.E.2d 662.

JUDGES: Moyer, C.J., and Cook, J., dissent. Resnick, J., not participating.

OPINION: RECONSIDERATION DOCKET

On motion for reconsideration. Motion denied.

Moyer, C.J., and Cook, J., dissent.

Resnick, J., not participating.

Ohio Revised Code § 2945.44 - Immunity of witnesses turning state's evidence.

(A) In any criminal proceeding in this state or in any criminal proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not

further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:

(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;

(2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to

give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he gave an answer or produced any information.

(C) A witness granted immunity under this section may be subjected to a criminal penalty for any violation of section 2921.11, 2921.12, or 2921.13 of the Revised Code, or for contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State of Ohio *Case No. CR96-5010

PLAINTIFF, *

vs. * **JOURNAL ENTRY**

Matthew J. Reiner*

*Honorable Judith Ann Lanzinger

DEFENDANT.

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1. Introduction

A jury trial began in this case on September 9, 1996 and on September 20 the jury rendered a verdict of guilty to the offense of involuntary manslaughter, an aggravated felony of the first degree. On October 4, 1996, defendant filed a motion for judgment of acquittal and alternatively, for a new trial. After due consideration, the court denies both motions.

II. Motion for Acquittal

Motions for acquittal have the same standard whether made during trial under Crim. R. 29(A) or after trial under Crim. R. 29(C). State v. Beehive Ltd. Partnership (1993), 89 Ohio App. 3d 718, 723. Judgment of acquittal should not be granted where the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved. State v. Apanovitch (1987), 33 Ohio St. 3d 19; State v. Bridgeman (1978), 55 Ohio St. 2d.261.

When viewed most favorably for the State of Ohio, the record reveals that the jury had sufficient evidence--medical opinions of three board certified pathologists and testimony of other witnesses, including that of both Debra and Matthew Reiner--to draw its findings that Alex Reiner died as a result of a severe shaking sometime after 10:30

p.m. on August 28, 1995, when he was alone with his father, Matthew Reiner. The motion for judgment of acquittal, therefore, is denied.

III. Motion for New Trial

Defendant relies upon section (A)(1),(2),(4) and (5) of Crim. R. 33[1] in filing his motion for new trial. He claims the proceedings were irregular in the grant of immunity to Susan Batt; that jury instructions with respect to immunity were contrary to law; that the court erred in refusing to

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[1]CRIMINAL RULE 33. New Trial

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights.

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

* * *

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

* * *

instruct on an "implied admission"; that the court erred in refusing to allow impeachment of Susan Batt on claimed injuries to other Reiner children; that there was prosecutorial misconduct in failure to disclose the coroner's "changed testimony"; that the expert opinions of the State's three pathologists were erroneous and unreliable under Evid. R. 702(C); that the defense was erroneously prevented from proving content of an alleged prior inconsistent coroner's statement; and that the jury engaged in misconduct.

After due consideration of all arguments and cases cited by the parties, the court denies defendant's motion for new trial.

Grant of Immunity

Both sides subpoenaed Susan Batt, the Reiner's former nanny, to appear in this case. When the State called her to the stand, Batt invoked her 5th Amendment right

against self-incrimination and refused to testify. The State then requested transactional immunity for her pursuant to R.C. 2945.44.[2] A hearing was then held to determine if both

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[2]R.C. 2945.44 governing witness immunity state:

"(A) In any criminal proceeding in this state * * * if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, **the court of common pleas** of the county in which the proceeding

is being held, unless it finds that to do so would not further the administration of justice, **shall compel the witness to answer or produce information, if both of the following apply:**

(1) The prosecuting attorney of the county in which the proceedings are being held makes a written requestto the court of common pleas to order the witness to answer or produce the information notwithstanding his claim of privilege;

(2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he

subsections (A)(1) and (2) applied.[3]

A valid assertion of the Fifth Amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. United States v. Apfelbaum (1980), 445 U.S. 115, 127. In Hoffman v. United States (1951), 341 U.S. 479, the Supreme Court explained the scope of danger:

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gave an answer or produced any information. * * *"
(Emphasis added)

[3] At a hearing for this purpose, the prosecutor stated that no evidence currently existed which would cause the State to indict Susan Batt on any crime. Finding that the statute had been met, the court granted immunity. Section (B), which defendant argues is a "precondition" merely discusses the effect of immunity.

> "* * * a real danger of prosecution also exists where questions, which appear on their face to call only for innocent answers, are dangerous in light of other facts already developed. In such a situation a witness bears no further burden of establishing a reasonable cause to fear prosecution beyond asserting the privilege and identifying the nature of the criminal charge or supplying sufficient facts so that a particular criminal charge can be reasonably identified by the court. The witness has met his burden and the court does not need to inquire further as to the validity of the assertion of the privilege, if it is evident from the implications of a question, in the setting in which it is asked, that a responsive answer <u>might</u> be dangerous to the witness because an injurious disclosure <u>could</u> result." At 486-87. (Emphasis added)

The peculiarities of this case, as well as the facts actually in evidence, warranted a grant of immunity to

ensure that all relevant evidence was before the jury. The defense advanced a theory throughout the trial that the former nanny was guilty of multiple acts of abuse against the Reiner twins. In this case, therefore, Susan Batt did have reasonable cause to apprehend a real danger of incrimination, for the defendant and the Reiner family also blamed her for the death of Alex. Defendant takes contradictory positions. On one hand, he argues that immunity was conferred too quickly, before the court heard defense evidence which would implicate Susan Batt; on the other hand, he maintains that her apprehension of self-incrimination was "imaginary and insubstantial." There is no evidence of prosecutorial misconduct in the State's use of immunity. The statute exists to allow the State to bring all witnesses before the trial jury. State ex rel. Leis v. Outcalt (1982), 1 Ohio St.3d 147, 149.

Jury Instructions

Susan Batt's testimony also was the subject of defendant's arguments against the immunity instruction, which was given, and of the "implied admission" instruction, which was not. Crim. R. 30[4] governs proposed jury instructions. "A charge to the jury should be a plain, distinct

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[4] Criminal Rule 30 states:

"(A) Instructions; error", record. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any partymay file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing. On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(B) Cautionary instructions. At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.

and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." Marshall v. Gibson (1985), 19 Ohio St.3d 10, 12, citing Parmlee v. Adolph (1875), 28 Ohio St. 10, paragraph two of the syllabus. In a criminal case, a defendant is entitled to have his requested special instructions included in the charge to the jury only when they are correct statements of the law, pertinent and not included in the substance of the general charge. See, State v. Comen (1990), 50 Ohio St.3d 206; State v. Guster (1981), 66 Ohio St.2d 266; and State v. Theuring (1988), 46 Ohio App.3d 152. The court retains discretion to use its own language to communicate the same legal principles: State v. Nelson (1973), 36 Ohio St.2d 79, paragraph one of the syllabus.

Defendant objected to the immunity instruction as "incomplete and slanted" because it included the phrase that Susan Batt was subject to perjury prosecution if she testified

falsely. Defendant argued this phrase improperly bolstered her testimony and gave the court's personal assurance of her credibility. Defendant offered an instruction on credibility from United States v. DeLoach (D.C. Cir. 1975), 530 F.2d 990, a case readily distinguishable, since it involved a defendant who bargained with the government for special treatment in exchange for his testimony at the trial of a co-defendant. In this case, the immunity instruction[5] given was taken word for word from R.C. 2945.44, which includes language that an immunized witness is still subject to the law of perjury. An instruction addressing the credibility of all witnesses was also given separately and informed the jury it did not have to believe all, or even part of someone's testimony, merely because that person was placed under

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[5] Normally, the suggested OJI instruction would have been used; however, one was not available on this issue. See, Brinkman v. Mazda Motor of Am., Inc. (May 13, 1994), Lucas County App., No. L-93-142, unreported, where statutory language was found to be the proper method to instruct a jury in absence of a pattern instruction. See also,

oath. The jury was fully instructed in the usual way on how to determine credibility of all witnesses.[6]

Defendant also requested an "implied admission" instruction with respect to Susan Batt. Debra Reiner, defendant's wife, asked the former nanny in Juvenile Court after her testimony was completed,[7] "Did you do it on purpose, or was it an accident?" Susan Batt did not answer, but instead lowered her head and walked away. Defendant requested an instruction that such behavior could constitute an inference of guilt and could be considered as an implied admission.

First, a hearsay objection to this testimony was

State v. Jacobs (1995), 108 Ohio App. 3d 328, 334.

[6] A copy of the written instructions is part of the record.

[7] Defendant filed a copy of the certified transcript of Susan Batt's testimony at proceedings held January 29, 1996 before Judge James Ray. It was during this hearing that she first asserted the 5th Amendment upon the advice of Loren Zaner, her attorney.

sustained at trial. Evid. R. 801(D(2)(b) applies to parties, and Susan Batt was not the defendant in this case.[8] Furthermore, a person admits the truth of a statement by adoption when that person hears, understands, and acquiesces in another person's statement when a reasonable person could and would have spoken out in denial. Zeller v. State (1931), 123 Ohio St. 519. The United States Supreme Court has noted that adoptive admissions implied by silence are troubling because a nondeclarant may have numerous other reasons, besides sponsorship, not to speak. See, Doyle v. Ohio (1976), 426 U.S. 610. At the time the question was asked, Batt was under instructions from her attorney not to answer anything. An instruction on adoptive admissions

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[8] Evid. R. 801(D)(2)(b) provides:

"(D) A statement is not hearsay if:

* * * (2) Admission by party-opponent. The statement is offered against a party and is

(a) his own statement, in either his individual or a representative capacity, or

(b) a statement of which he has manifested his adoption or belief in its truth. * * *"

would have been improper.

Evidentiary Rulings

The defendant presents several arguments on evidentiary issues: that he was precluded from impeaching Susan Batt by not being allowed to separately cross-examine her as to each and every one of the eighteen assertions of her Fifth Amendment privilege in Juvenile Court; that opinions as to the cause of collapse and death expressed by the three coroners called by the State should have been struck under Evid. R. 702(C); and that defendant should have been allowed to

prove the fact and content of an alleged prior inconsistent statement of the Lucas County Coroner during his grand jury testimony. All these matters were addressed through rulings at trial and have been preserved for the record on appeal. This court denies a new trial on evidentiary grounds.

Medical Testimony and Prosecutorial Misconduct

The defendant argues prosecutorial misconduct in that the State failed to disclose a change in the coroner's testimony and a new trial theory unsupported by physical evidence. The argument that there was misconduct in the grant of immunity has already been noted. To obtain reversal of a conviction due to prosecutorial misconduct, a defendant must show that a prosecutor acted improperly and that the improper conduct prejudiced defendant's substantial rights. See, State v. Smith (1984), 14 Ohio St. 3d 13, citing United States v. Dorr (1981), 636 F. 2d 117. The prosecutor's conduct must be judged within the context of the whole case. State v. Draughn (1992), 76 Ohio App. 3d 664.

After due consideration of all of the arguments, review of the briefs and applicable law, the court finds

defendant's characterizations of the medical testimony inaccurate and the arguments unpersuasive. As such, a new trial is unwarranted for prosecutorial misconduct. See, State v. Schiebel (1990), 55 Ohio St.3d 71; State v. Shepard (1983), 13 Ohio App.3d 117;

Toledo v. Stuart (1983), 11 Ohio App.3d 292.

Jury Misconduct

Motions for new trial on allegations of jury misconduct must be supported by affidavit.[9]

The State objected vehemently to Rolf Sandberg's affidavit, portions of which stated:

5. Until I was excused as an alternate juror on

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[9] Crim. R. 33(C) provides: "Affidavits required. The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth and may be controverted by affidavit.

September 19, 1996, I was present and took part in discussions concerning the case with some of the trial jurors who later

deliberated;

6. In none of those discussions concerning the case was the entire panel of the twelve

jurors who deliberated present;

7. In those discussions with fewer than all the jurors present, the case was discussed,

including assessments of evidence, characterizations of evidence, determinations of the

credibility of witnesses, and individual jurors' opinions about the guilt or innocence of the accused."

(Sandberg Aff. paras. 5-7)

The State maintains that Sandberg is incompetent to raise any issue to impeach the jury's verdict because he was an alternate juror in the Reiner trial. It relies upon Evid. R. 606(B) which provides:

"Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to asset to or dissent from the verdict or indictment or concerning his mental processes in connection

therewith. **A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act of event has been presented.**

However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes." (Emphasis added)

This rule prevents impeachment of a jury verdict by a juror unless foundation is first provided by evidence "*aliunde*", that is, from an extraneous, independent source. See, e.g. State v. Kehn (1977), 50 Ohio St.2d 11; State v. Rowe (1993), 92 Ohio App. 3d 652, 675; State v. Peterson (Mar. 11, 1996), Stark App. No. 95CA0213, unreported (witness reporting juror stated she "changed her mind" not evidence aliunde.); State v. Fleming (Aug. 2, 1991), Erie App. No. E-90-16, unreported (counsels' observation of

dictionary and thesaurus in jury room was evidence *aliunde.)*

Defendant argues that the rule does not apply to bar Sandberg's testimony because he was an alternate juror, and because the purported misconduct happened outside the jury room and before deliberations. As authority, he relies upon State v. Rudge (1993), 89 Ohio App. 3d 429, an appellate decision involving grant of a mistrial for jury misconduct in a capital case. Two judges distinguished the status of alternate jurors from "deliberating" jurors for purposes of the *aliunde* rule.[10] The rule was also held not to apply to questions of misconduct occurring before deliberations. The Rudge court found definite bias in the statement that "we could save a lot of time and money and just hang him now" since it evidenced a juror who was not impartial but instead

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[10] Judge Ford, the presiding judge in Rudge, expressly disassociated himself from this view in his concurrence and furthermore, asked the Supreme Court for guidance in how to apply Evid. R. 606(B) when allegations of misconduct of this type arise.

was predisposed to a guilty verdict and a death penalty.

This case differs from that of Rudge. Defendant is not seeking a motion for mistrial as a result of prohibited conversation engaged in while the case is pending. In such event all jurors can be interviewed *in camera* about the effect, if any, of improper discussions before deliberations take place. Here, Sandberg first raised his misconduct allegations and made them known to defense counsel only after a verdict was entered. His testimony as a member of the jury is being offered to attack the credibility of the verdict afterward and obtain a new trial.

Additionally, Rudge is not an expression of the Supreme Court of Ohio. The policy of the *aliunde* rule was explained by the Supreme Court in State v. Adams (1943), 141 Ohio St. 423, 427:

> * * * [A] juror comes into court with bad grace in attempting to prove his dishonorable conduct and to

stigmatize his companions; that the rule is based upon conditions of public policy, which, if not adhered to, would encourage further litigation and indefinitely postpone its termination; that to permit a juror to impeach the verdict by his testimony would allow a dissatisfied or corrupt juror to destroy a verdict after he had assented to it; and that to permit such testimony would destroy the privacy of the deliberations of the jury and expose the jurors to criticisms and embarrassment."

Rule 606(B) was designed to prevent such an attack by a juror[11] who may be unhappy with the verdict's result. The situation does not change simply because Sandberg was a non-deliberating juror. While it is true that a hearing on the issue of juror misconduct was scheduled October 31 by the court in an abundance of caution and over the State's objection, no hearings should have been held on this issue until there was competent non-juror evidence.

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[11] The argument that alternates are not jurors for purpose of the *aliunde* rule is unpersuasive. Compare policy reasons stated in Grier v. Standard Oil Co. (Apr. 18, 1991), Cuyahoga App. No. 58279, unreported (plaintiff's affidavit reporting juror statements should not be accepted as evidence *aliunde* to attack verdict for policy reasons.) The court now finds that the affidavit of Rolf Sandberg was not competent under Evid. R. 606(B) to impeach the verdict. For

Assuming for the sake of argument that Sandberg's affidavit was competent as an outside source, the allegations of misconduct then required further investigation. It was this court's task to determine credibility after seeing the witnesses and listening to their testimony to determine if there was bias against Matthew Reiner. See, State v. Johnson (January 8, 1992), Wayne App. No. 2659, unreported.

Mr. Sandberg simply was not a credible witness. His demeanor was less than candid and on cross examination, his memory was revealed to be very selective. He denied listening to what his initial role would be as an alternate juror. He backtracked on certain points; four jurors "plus or minus" were party to these discussions--or "at least two and no more than six" jurors were present. He did not recall

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that reason alone, the motion on grounds of jury misconduct should be denied.

dates or times of any conversations. On cross examination, he mentioned that jurors #1, #4 and #6, all women, and possibly juror #2 or #3 (a "heavyset" man in the front row) may have been part of the "discussions".[12] He could not recall jury admonitions being given by the court, although they "may have" been.[13]

Sandberg reported that he talked about the clarity of the coroner's testimony, Susan Batt's demeanor and the grant of immunity, the expertise of defense counsel and that

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[12] At the November 6 hearing, jurors #1 and #6 testified that they were the two who had spoken with Sandberg. No other juror recalled being party to discussions although juror #7 overheard a discussion that "seemed inappropriate" at the time.

[13] Court Exhibit 1, a transcript of the admonitions given during the trial, show the numerous times the standard instruction was given to the jury.

defendant paid his attorneys $100,000 for their representation. He admitted to wanting to deliberate with the jury, being upset because he could not, knowing that his comments were not appropriate, and expecting that defendant would be found not guilty. He commented "It would be absurd to go with anything but 'not guilty'". He never informed the court of any of his statements although he had the opportunity to do so, and did not volunteer this information to anyone until he approached defense counsel several days after the verdict was announced. Initially, Sandberg said he did not dictate his affidavit to defense counsel and later, stated he "may have." In any event, the full import of his affidavit was not borne out either in his testimony, or more importantly, later in the testimony of other jurors.

On November 6, 1996 the twelve deliberating jurors

testified.[14] Their forthright responses to far-ranging questions from both parties, their demeanor on the stand and reasonableness of their answers lead to the conclusion that they testified truthfully.[15] All readily admitted that instructions not to talk about the case were given along with other instructions. Defense strongly objected to the State's asking whether any improper conversation with Mr. Sandberg affected their verdict, which they uniformly denied.[16] In finding no prejudice to defendant, or

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[14] The jurors who testified on November 6 were understandably upset at being called into be questioned after they were released from serving on this case. In retrospect, it appears that if the continuation of hearing were proper, the jurors should have been questioned by the court rather than grilled for five hours regarding the details of their jury service under the guise of "credibility determinations."

[15] Defendant emphasized the testimony of juror #9, the foreman, to say the jury was obviously biased. At hearing Nov. 6, he testified he had no knowledge about whether misconduct occurred. He did not believe the claim of misconduct when he read it in the newspaper. He indicated he "didn't think it was true" and then thought that Sandberg may have been a "plant" by defense. It is important to note that these remarks were made well after deliberations were complete and a verdict was rendered in this case. Juror #9 as well as the other jurors expressed some natural hostility at having their deliberations called into question. It is precisely this that Evid. R. 606(B) was designed to prevent.

[16] The objections were overruled. It appeared at the time that the State

alternatively, that any presumed prejudice was effectively rebutted by the State, this court is specifically *not* considering any statement by the jurors that could be considered a subjective statement prohibited by Evid. R. 606(B).[17]

Defendant was not prejudiced. No one but Sandberg expressed an opinion and his opinion was defendant was not guilty. Sympathy for the defendant is not prejudicial. See, State v. Doan (September 29, 1995), Hamilton App. No. C-940330 unreported; State v. Jones (1992), 81 Ohio App. 3d 348, 353 (speaking with defense witness and voicing sympathy is not prejudicial); State v. Taylor (1991), 73 Ohio App. 3d 827 (jurors speaking with defense witness found

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should have the opportunity to show that the technical violations did not impact the defendant adversely. Interestingly, defendant argues that Evid. R. 606(B) does prevent these questions, since they relate to the jurors' thought processes during deliberations. On the other hand, speculation about the effect of certain statements runs through defendant's own brief.

[17] In other words, the denials of the effect upon the deliberations are themselves stricken.

non-prejudicial). The real concern is with bias and prejudice against the defendant. Busick v. State (1850), 19 Ohio Rep. 198 (opinion expressed as to defendant's probable guilt); State v. Carter (1890), 11 Ohio Dec. Rep. 123 (where action shows bias or opinion as to guilt, verdict should be set aside.) In State v. Luoma (Dec. 7, 1990), Montgomery App. No. 10719, unreported, motion overruled (1991), 59 Ohio St.3d 707, rehearing denied (1991), 60 Ohio St.3d 709, for example, a juror stated to a non-juror that the defendant was "a menace to society and should be locked up and the key thrown away forever." A new trial was warranted in such a case.

Defendant maintains he was prejudiced by the mere fact of conversations before deliberation. Misconduct alone, however, is not enough; it must materially affect substantial rights. Defendant's constitutional Sixth Amendment right to

trial by jury is designed to ensure him a fair trial by a panel of impartial jurors. Irvin v. Dowd (1961), 366 U.S. 717, 722. When possible juror misconduct is brought to a trial judge's attention, it is her duty to investigate its nature and extent and to determine whether there may have been a violation of the Sixth Amendment. See, e.g., State v. Taylor (1991), 73 Ohio App. 3d 827, 833 (bias or prejudice is refusal to consider the evidence or forming opinion of guilt or innocence before all evidence is presented); State v. Persinger (February 21, 1991), Montgomery App. No. 11468, unreported, (overheard conversations of two jurors did not indicate partiality, thus no prejudice); State v. Collins (1977), 60 Ohio App. 2d 116, 123 (improper reading of newspaper article about case); State v. King (1983), 10 Ohio App. 3d 161 (contact with outside attorney and independent consultation found not prejudicial); State v. Kehn (1977), 50 Ohio St.2d 11 (extensive trial notebook of juror no

prejudicial effect).

Here, even if misconduct occurred, and it was presumed to be prejudicial, (see State v. Hart (1988), 57 Ohio App.3d 4), the State rebutted the presumed prejudice beyond a reasonable doubt. With respect to the content of what was said, none of the statements show enmity or bias against the defendant. The comments about expertise of, or payment to defense counsel,[18] while ill-advised, were made by Sandberg alone. Statements about the coroner's clear testimony and questions over Susan Batt's demeanor and why she obtained immunity were made, at most, to two other jurors. Juror #1 and juror #6 who may have assented to some of Mr. Sandberg's inappropriate comments should, of course, have reported this misbehavior to the court. The fact

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[18] Jurors #1 and #6 recalled Sandberg commented he had "heard" that counsel were paid $100,000 to represent defendant but didn't mention where he had gotten that information. Sandberg himself at one point "did not recall" saying that. While defense speculates that somehow the jury would have been adversely affected by such a comment, the court finds that the lengthy hearing

they did not shows his statements were not considered significant. There was no evidence either of the two jurors repeated them to others. There is no evidence that Sandberg expressed anything but his own thoughts of partiality on behalf of the defendant. All statements were made in the judges' library next to the jury room during trial recesses before the jury was given full and final instructions about what to consider during their deliberations. The statements can not be characterized as "outside influence" since Sandberg did not deliberate with the jury and did not have contact with the twelve deliberating jurors at any time after they were excused for that purpose. Any presumption of prejudice was rebutted from the context and circumstances revealed at the hearings. The jury was not biased against the defendant and it impartially considered the evidence.

The law presumes proper conduct on the part of the

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with all deliberating jurors does not bear that out.

jury. Jurors are presumed to follow their instructions. Unless the record demonstrates otherwise, it must be assumed the jurors followed their oaths and decided the case based solely on the evidence presented at the trial. State v. Durr (1991), 58 Ohio St. 3d 86, 91; State v. Zuern (1987), 32 Ohio St. 3d 56, 60, cert. Den. (1988), 484 U.S. 1047; Lund v. Kline 91938), 133 Ohio St. 3d 317, 320. The court finds any presumed prejudice was rebutted beyond a reasonable doubt by the circumstances surrounding the remarks made by Sandberg, a juror disgruntled over being excluded from deliberations. A new trial is not warranted on grounds of jury misconduct.

IV. Motion to Correct Record

On November 18, as part of a supplemental filing, defendant filed a motions to "correct the record" asking the prosecutor to submit the grand jury tape of the testimony of

Dr. James Patrick's testimony in this matter for inclusion in the record. He also seeks a certification by the prosecutors of all "post-verdict contacts" with jurors in this case.

The State attached the transcript of Dr. Patrick's testimony as Appendix E to its supplemental memorandum. The tape, therefore will be ordered submitted as an exhibit on appeal for purposes of comparison. The request for certification is not well-taken and is denied. Defendant's motion to correct record is therefore granted in part and denied in part.

JOURNAL ENTRY

It is ORDERED that:

Defendant's motion for judgment of acquittal or in the alternative for new trial is DENIED; Defendants motion to correct the record is GRANTED IN PART and DENIED in part. The State of Ohio is ORDERED to submit the grand jury tape of Dr. James Patrick's testimony in this matter for inclusion as an exhibit on appeal. Defendant's sentencing is SCHEDULED for December 13, 1996 at 10:00 a.m.

December 9, 1996

Judith Ann Lanzinger

cc: J. Christopher Anderson, Mark Lupe, Patricia Hayes, Robert Kaplan, Sam Kaplan, Richard Walinski

State of Ohio v. Reiner

99-427.

SUPREME COURT OF OHIO

86 Ohio St. 3d 1417; 711 N.E.2d 1011; 1999 Ohio LEXIS 2247

June 30, 1999, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Lucas App. No. L-97-1002.

JUDGES: RESNICK, J., not participating.

OPINION:

MOTION DOCKET

On review of order certifying a conflict. The court determines that a conflict exists; the parties are to brief the issue stated in the court of appeals' entry journalized February 9, 1999, at page 3:

"In State v. Thomas[, 1995 Ohio App. LEXIS 3244] ([July 26], 1995), Athens App. No. [94]CA1608, unreported [1995 WL 468183], inquiry was made of a juror as to whether

exposure to extraneous information or improper outside influence affected the juror's impartiality. The juror's response appears to have partially served as a reason for concluding a lack of prejudice from juror misconduct. We must conclude that, at least tacitly, the Thomas court found permissible a practice we have held to be improper. Accordingly, we find a conflict between this decision and our own and do so certify.

"The issue submitted is whether Evid.R. 606(B) permits, under any circumstances, inquiry for a juror as to the effect of extraneous information or improper outside influence upon his or her decision making process."

RESNICK, J., not participating.

Sua sponte, cause consolidated with 99-239, *infra*.

RESNICK, J., not participating.

State of Ohio v. Reiner

99-239.

SUPREME COURT OF OHIO

86 Ohio St. 3d 1418; 711 N.E.2d 1012; 1999 Ohio LEXIS 2257

June 30, 1999, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Lucas App. No. L-97-1002.

JUDGES: RESNICK, J., not participating. COOK, J., dissents. PEGGY BRYANT, J., of the Tenth Appellate District, sitting for RESNICK, J.

OPINION: DISCRETIONARY APPEALS ALLOWED

Discretionary appeal allowed.

RESNICK, J., not participating.

Discretionary cross-appeal allowed.

COOK, J., dissents.

PEGGY BRYANT, J., of the Tenth Appellate District, sitting for RESNICK, J.

Sua sponte, cause consolidated with 99-427, *supra*.
RESNICK, J., not participating.

Courtroom No. 5
Lucas County Courthouse
Toledo, Ohio
Tuesday
September 10, 1996
9:08 a.m.

THE COURT: This is the State of Ohio versus Matthew Reiner, case number 96-5010. We have defendant present with counsel of record as well as counsel for the State of Ohio. We are not in the presence of the jury yet.

And I understand there may be something for the record first. Whose motion would this be? Who wishes to raise the matter?

MR. ZANER: Your Honor, I guess I am. I have a witness that's been subpoenaed by both the State and the defendant in this case, a one Susan Batt who was the Reiners' babysitter.

In a previous hearing in juvenile court where she was called to testify on behalf of the defense, we have pled the Fifth, and it

is our intention on both the prosecutor's and the defendant's subpoenas to also plead the Fifth.

It is my understanding after numerous discussions I had with the prosecutor's office, having had an opportunity to review medical records that they've provided to me, that the witness is not the focus of the investigation of the prosecutor.

However, I'm also aware in this case that in discovery the defendant made a tactical choice not to request names of witnesses. So therefore they have not had to supply witnesses to the prosecutor.

I have no idea what witnesses the defense will be calling on their behalf including experts that may be testifying to state that the coroner and the other medical experts on behalf of the State could in fact be incorrect in their analysis, that in fact the window of opportunity for the causing of

whatever occurred to this child to cause the death could have occurred during the period of time that my client was babysitting for this child, and as a result of that I am convinced after discussion with the defense that my client is the focus of their defense that she is in fact responsible for the death of this child.

And therefore it is very possible that after the completion of the case, if the prosecutor is convinced after listening to the defense experts that they may call that in fact it could have been my client and not Mr. Reiner as they are proceeding with today, she could in fact be subject to criminal prosecution. And therefore it is our intention to plead the Fifth and refuse to testify.

THE COURT: Mr. Anderson.

MR. ANDERSON: Your Honor, we were able to serve the witness, Susan Batt, with a subpoena yesterday. So I guess she's here pursuant to

subpoena today. Obviously, I've gotten on this case very recently. I was informed she had takeen the Fifth Amendment in juvenile court proceedings.

I've examined the issue of immunity pursuant to 2945.44, but I don't think it really is applicable in this particular case.

Miss Batt gave a statement to a CSB caseworker which she clearly indicated she was not involved in circumstances or there was no culpability on her part for the crime that is alleged in this indictment.

Further, Mr. Zaner has not indicated that she could testify in any way that would be culpatory of her in any fashion. So we have four experts who are saying that the window of opportunity would exclude her as being the perpetrator of this offense.

And obviously if there's contradicting evidence, we would still have four of our witnesses, including the coroner,

who we're basing our case on stating that she is not or could not have been the perpetrator here. So I don't know how in the interest of justice I can request immunity for this witness because it doesn't seem to me that she in any way has anything to assert the Fifth Amendment priviledge to protect herself, or I'm unaware of anything.

So I'm sort of at a loss saying I want to make a request that's in the interest of justice. This Court should compel her to give testimony, and we will grant her immunity for what I don't know, because as far as I know she is not culpable in any fashion.

THE COURT: Mr. Walinski.

MR. WALINSKI: Your Honor, a couple of things. In all candor we must admit to the Court that Mr. Zaner's characterization of our defense is accurate. I should point out to the Court that the coroner has expressed an opinion in the autopsy that puts the cause of

death at a time when -- that incorporated a time when Susan Batt was solely in -- had the twins solely in her custody.

He has since modified that, but he has expressed an opinion. There have not been any questions, and she's not been asked any questions with respect to the injuries that have been diagnosed to Derek that happened during the period during which she had regular -- exclusive custody of the children. Those were the rib injuries that were referred to in opening which were diagnosed several days to a couple of weeks before the -- the radiological survey was taken.

So I don't quite understand the State's ability to say that there is no culpability for that crime has not yet been charged to anyone. And indeed you will hear from the stand from the coroner testimony that a time frame that he opined for this injury included a period of time when she was solely -- had the kids solely in her custody.

MR. ANDERSON: They're saying to -- trying to backdate a fracture by x-ray. There's only a frame of time. They're not going to be able to pinpoint it. So obviously there was a period of time she was with the kids, and there was obviously a lot of times the other people were there. There's no evidence that specifically puts her there. There's been no proffer to me by Mr. Zaner who indicates that she would in any way testify that would be inculpatory on her part.

MR. WALINSKI: She has already said that -- there are statements to a list of questions presented to her at the juvenile court testimony. She repeatedly said that her answers to those questions would tend to incriminate her.

MR. ANDERSON: I'm not aware of that, Your Honor.

MR. WALINSKI: It's in the transcript.

MR. ROBERT KAPLAN: It's in the record incidentally.

THE COURT: Could we make that transcript available to Mr. Anderson so he is aware of what we're talking about here? Do we have that?

MR. ROBERT KAPLAN: Yes. It's filed. I'll give you a copy.

THE COURT: Why don't you do that.

MR. ROBERT KAPLAN: We filed it with the motion to dismiss the other day.

MR. WALINSKI: And one other thing, Your Honor. There will be the testimony about a prior brain injury that the coroner himself observed that was several days to a couple of weeks before a second brain injury that in his opinion was the injury that led to the respiratory arrest. That would certainly

put her in a class of people who had periods of time during that time had exclusive custody of the children.

MR. ROBERT KAPLAN: I'm giving the prosecutor the testimony of Susan Batt, juvenile court on January 29th, 1996. It's also in the Court's file. Was previously filed in this case.

THE COURT: Mr. Anderson, if you'd like to take a moment to review that.

MR. ANDERSON: Your Honor, I would just indicate that says, Will you please state your name? Susan Jo Batt. Will you give the Court your present home address? And she refuses to answer after that.

MR. WALINSKI: And states the reason.

MR. ANDERSON: Her home address is going to incriminate her?

THE COURT: Your position, Mr. Zaner, is that if your witness is called, she will only take the Fifth Amendment and nothing further?

MR. ZANER: That is correct, Your Honor.

THE COURT: And that is what you wish to bring before the Court. No matter who calls her, that is her position?

MR. ZANER: That's absolutely correct.

MR. WALINSKI: So the record is clear, Your Honor, let's confirm that Mr. Zaner is correct in representing that we have subpoenaed her, and it is the defense intention on that if she is available to put her on the stand if the Court rules that she's available.

THE COURT: Let me ask if any of the attorneys have any helpful authority for

the Court's decision here?

MR. ZANER: Your Honor, I think with my client being a focus of at least of the defense, and she is potentially in the time frame as to when these matters have occurred. I have no idea what else the defense may be presenting. But she may be called to show that when certain of these injuries have occurred that the only person that could have been potentially available was my client. And clearly it's our plan to enter the Fifth Amendment to any questioning unless we are granted a complete and absolute immunity in this matter which the prosecutor feels they can't give.

MR. WALINSKI: That is for – in our view would encompass injuries of the deceased and the twin.

MR. ANDERSON:

Obviously I don't think you have any input as to whether we're

going to request immunity or not. The defense has no say-so. It would be our request pursuant to 2945.44 and defense has no play in that whatsoever.

THE COURT: I'd like to review the law that's being cited here.

MR. WALINSKI: Is the Court -- want to go look at the law of the propriety of invocation or the effects of it?

THE COURT: I'm trying to figure out what is the request before the Court. For the last time is there any request? I understand what the witness is proposing to do if she is called. But what is the request before the Court?

MR. ZANER: Your Honor, the request is that -- I don't have the case in front of me, but I believe Mr. Walinski has it that. If it is known to this Court that my client plans on pleading the Fifth Amendment,

that she would not be called to the witness stand at all.

MR. WALINSKI: You're right. Your Honor, he's referring to the first syllabus of State versus Kirk. I can give you the citation.

THE COURT: If you would, please.

MR. WALINSKI: 72 Ohio State 3d, 564. I can read it to the Court if you want to hear it. A trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the Court determines that the witness will not offer -- excuse me, Your Honor -- any testimony but merely intends to assert the Fifth Amendment privilege against self-incrimination. That's a 1995 Supreme Court of Ohio decision.

THE COURT: In that event

then the witness becomes an unavailable witness.

MR. WALINSKI: That's correct, Your Honor. The consequence of that we're not talking about yet. We're just talking about --

THE COURT: All right. And what is the State's position? This is a discretionary matter for the Court apparently.

MR. ANDERSON: Right. Well, I need to discuss it with some other people in my office whether we would even be willing to even discuss immunity. Even if immunity was granted, we would probably only grant it as to any of her conduct on the 28th day of August and the ask the Court to compel her to testify as to what occurred on that date.

I don't think we would have to go into the other dates on that, and I think we can compel her under subject of contempt that she would have to answer those questions.

THE COURT: All right. What I would like to do then is give a brief recess

for the State to confer so that we can resume.

This is going to be the first witness?

MR. ANDERSON: No. This is -- she's well down the list.

THE COURT: All right. What I would like to do then is begin the trial for the day so that we can get the jury started. And during the recess there will be an appropriate recess taken. Mr. Zaner will be given the decision -- don't want to tie him up for the entire day -- but well in advance so that he can consult with his client.

MR. ZANER: Your Honor, if we could, my client is in from out of town. If there's a number of witnesses, I would expect the earliest she might be needed wouldn't be until tomorrow. If that's correct, I think we can let her go for today.

MR. ANDERSON: No. It's

my understanding we'll put her on today.

THE COURT: All right.

THE COURT: So, Mr. Zaner, we will make sure that you have notification of what is occurring well in advance.

MR. ZANER: All right. Very good, thank you, Your Honor.

THE COURT: Is there anything more before we begin jury -- testimony for the jury?

MR. ANDERSON: Your Honor, the initial testimony is going to come from two tapes that we have. The first one is a 9-1-1 tape, and the second one is the EMS tape. It's my understanding we have a stipulation that these tapes are accurate copies, that they would stipulate as to their authentication.

Courtroom No. 5
Lucas County Courthouse
Toledo, Ohio
Wednesday
September 11, 1996
10:25 a.m.

THE COURT: Good morning.

Please be seated.

State of Ohio versus Matthew Reiner.

We note the presence of the defendant. This is case number 96-5010. Third day of trial.

Also present defense counsel, Sam Kaplan and Robert Kaplan and --

MR. WALINSKI: Right here.

THE COURT: -- Mr. Walinski. Also for the State of Ohio Chris Anderson, Mark Lupe and Patricia Hays. We are out of the presence of the jury. Let me ask if there is anything for the record at this time?

MR. ANDERSON: Your

Honor, I would indicate that my conversation with Mr. Zaner that is he would like to participate in our discussions regarding the immunity issue with his client, and he is not available later on today. So I don't know if you could address that at this point in time which would require the State of Ohio to call her as a witness and go forth in that procedure but maybe not take her full testimony at that point in time because I believe there's going to be substantial oral argument made in regard to that issue.

THE COURT: All right. Let's clarify who is actually representing Miss Batt. I thought we were talking about John Thebes.

MR. ZANER: Your Honor, I'm available. I'm back here as long as we can do something on it this morning. I talked to Miss Batt. I talked to Mr. Thebes concerning that.

THE COURT: All right. So there's no problem with your acting as the counsel.

MR. ZANER: That's correct.

THE COURT: Fine.

MR. WALINSKI: Your Honor, may I just say that Joe Thacker is here on behalf of Debbie Reiner and --

MS. WAGNER: Laurie Wagner as guardian ad litem for the children.

THE COURT: All right. Let's proceed then.

MR. ANDERSON: At this time the State of Ohio would call Susan Batt.

MR. THACKER: Your Honor, may I approach the bench?

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(The following discussion was held at the bench.)

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THE COURT: Yes.

MR. THACKER: Judge, just for the purposes of this hearing Debbie Reiner is in the courtroom. No one has any objection to it.

MR. ANDERSON: Fine.

MR. THACKER: Thank you.

THE COURT: Good.

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(End of discussion at bench.)

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Thereupon, the State of Ohio, to maintain the issues on its part, called as a witness,

SUSAN BATT,

who, being first duly sworn, as provided by law, was examined and testified as follows:

- - -

DIRECT EXAMINATION

- - -

BY MR. ANDERSON:

Q. Could you please state your name for the record?

A. Susan Batt

Q. And are you married?

A. I refuse to answer on the ground that said answer might tend to incriminate me.

Q. Okay. It's my understanding that you have your attorney here with you today; is that correct?

A. Yes.

Q. And that's Mr. Zaner?

A. Yes.

Q. Sitting here?

A. Yes.

Q. And he's going to -- has he instructed you or are you plananing on invoking the Fifth Amendment as to any and all questions asked to you today?

A. Yes.

Q. Are you refusing to testify?

A. Yes.

MR. ANDERSON: Your Honor, I have a document prepared. It has not been filed. I served a copy of it on defense counsel. If I may approach.

THE COURT: Yes.

MR. ANDERSON: It's a

written report pursuant to 2945.45.

MR. WALINSKI: Your Honor, may we ask the witness be excused for the hearing? There will be characterizations of her testimony.

THE COURT: Any objection, Mr. Zaner?

MR. ZANER: I have no objection to that, Your Honor.

THE COURT: Miss Batt. You may step down. We're dealing under 2945.44, immunity of witnesses under section (A). In any criminal proceeding in this state if a witness refuses to answer or produce information on the basis of privilege against self-incrimination, the court of common pleas, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer if both of the following apply. And then we get into the first which is the motion written that is now before the

Court, and that the Court make certain statements to the witness beforehand.

The issue here is the issue of whether immunity would not further the administration of justice, and I'm assuming that is the objection of the defendant at this time. Mr. Walinski.

MR. WALINSKI: Well, Your Honor, it -- the defendant certainly has that view. There are others who share that view, and it's a determination the Court's called upon to make. Those who have an interest in that Court's determination ask an opportunity to be heard on that element of the Court's determination.

THE COURT: Does the State have any objection to that?

MR. ANDERSON: Yes, Your Honor. I would indicate that in case law that I'm able to find, more specifically the State Ex Rel.

Leis, L-e-i-s, versus Outkalt, O-u-t-k-a-l-t, which is or can be found at 1 Ohio State 3d, 47, state's that furthermore Ohio Revised Code Section 2945.45 provides the grant of immunity only upon the written request of the prosecuting attorney.

Under former Ohio Revised Code Section 2945.44 immunity could be granted upon request of either the prosecutor or the defendant. That was State versus Brody, a 1974 case.

The present statute, however, clearly reflects the intent of the general assembly that immunity be used only as a prosecutorial tool to fulfill the government's need for testimony.

It would be our position that neither defendant nor the parties represented by Mr. Thacker or Miss Wagner have an interest or standing to contest our raising of this issue.

It is a prosecutorial tool that is

not subject to objection by their -- by their attorneys, and we would request the Court overrule or disallow them to argue their points of view on this issue.

THE COURT: All right. You may respond to the objection.

MR. WALINSKI: Your Honor, our participation on this is simply as an interested party who hopes to remind the Court of factors that influence the criterion that the Court must apply, and that is whether the grant of immunity is in furtherance of the administration of justice.

That criterion is -- has not been explicated in Ohio to any extent. In State versus Brody the Court made it clear that whether the testimony will advance or retard a party isn't the limited scope of that reach. It's a broader reach. It's whether the interest of justice will be administered.

The defendant has stated its

position. We appreciate the Court's hearing us yesterday with respect to our view of what that criterion means as applied to the facts of this case.

I do want to clarify just one observation that we discussed yesterday. The Court noted that both sides had subpoenaed, and it seemed to have draw I think an unwarrantedly broad inference from that fact. The Court, I thought, drew the inference that it was both parties who expected to elicit substantive testimony in this case from Susan Batt, at least as far as the defense is concerned. Our only indication even until now has been that as she did on the stand now she's going to assert the Fifth altogether.

The purpose of our subpoena was simply to establish the 804 (A) (1) unavailability in order to lay the foundation for 804 (B) (3) statements. And I think the Court's inference from the issuance of the subpoena that we

intended to get substantive testimony is inaccurate.

Beyond that, Your Honor, I don't wish to present further argument of our position except to put this issue briefly in context. The defense issued the subpoena for the reasons I just stated. The prosecution has issued the subpoena because of the Court's ruling on -- as I understand because of the Court's ruling the document that Peri Stiger authenticated under 803 (8).

The expectation is that the coroner will testify, as Mr. Anderson said yesterday, that he relied upon the investigation and some facts from certain witnesses whose statements were related in Peri Stiger's report.

You're faced with this question of immunity solely to be able to get in -- so that the State can get into the record a fact upon which their expert will say that he relied.

It's a fact that could have been obtained in any number of ways. It's a fact

that had the prosecution early in this case looked at a number of possibilities instead of a focused -- instead of focusing on Matt Reiner exclusively, they would have taken care to have gotten in a way that's plainly admissible without compromising the interests of the State.

This issue is simply an issue that's arising because of a ruling on evidence, a ruling that requires in Ohio the facts upon which the coroner will base his opinion to have been introduced in evidence.

They elected to get that evidence before the coroner in a way that was fragile. That was certainly foreseeable. It was certainly foreseeable it would be difficult to establish at trial. They elected not to get that fact before their expert in a more -- in a more solid fashion.

But we are -- we're here today on this large immunity question simply so that we

can get a foundation laid for the ex -- for the coroner's opinion.

This is what I understand to be the probative value of the testimony that the prosecution expects to elicit from Miss Batt. There may be a different proffer.

MR. ANDERSON: Your Honor, I -- with all due respect to Mr. Walinski, that's not the reason that we're calling her. There's a lot of reasons why we're calling her. It's a matter of our trial strategy. But obviously she's been mentioned by the attorneys in this case in opening statement. She's a percipient witness. There's a lot of reasons for her to take the stand.

THE COURT: I understand.

MR. WALINSKI: Beyond that, Your Honor, the defense has no further argument at least at this point.

THE COURT: All right. Mr.

Thacker, I'll allow you to make a brief statement even though the State is objecting to it.

MR. THACKER: On the -- to specifically deal with the grant of immunity, Your Honor.

THE COURT: A brief statement.

MR. THACKER: Your Honor, you appreciate that I represent Debbie Reiner, Your Honor, as I told you. She is in the courtroom today in the back of the courtroom. Debbie Reiner is in a very real sense one of the victims of these crimes. She is the mother of the decedent, of the deceased child. Her child was the victim in this case. She was -- she's also the mother of two other children who were in the home during the time when this injury was allegedly inflicted.

I want to point out to the Court that in considering whether the grant of immunity is

in the furtherance of the administration of justice, Debbie Reiner's views are important and what she knows about this case are -- is important.

What the Court needs to consider is that the evidence in this case will establish several facts that are relevant to the immunity issue. First, that for the month prior to the death of Alex, Susan Batt, the person to whom the State wants to grant immunity, was in this home. For two weeks prior to the death of Alex, Susan Batt was the person who was in this home alone with Alex and with his siblings for 40 hours a week.

The evidence in this case will establish that during that time period during that two weeks before Alex's death, Alex suffered the following injuries in addition to the fatal head injury that is at issue in this case.

He suffered a broken tibia. The

evidence will indicate that he suffered that broken tibia in the two weeks during which Miss Batt was a nanny in the home. The evidence will indicate that he suffered another head injury during the two weeks prior to his death during the time period when Miss Batt was the nanny in the home in the home for 40 hours a week alone with the children. The evidence will indicate that he suffered a broken rib during that time period.

The evidence will indicate that his brother, Derek, suffered three fractured ribs, again, during the two weeks before Alex's death during the two weeks when Miss Batt was the nanny in the home alone where the children 40 hours a week.

The evidence will also indicate that Miss Batt when asked about this case took the Fifth Amendment, indicated that she refused to testify on the grounds that her answers may tend to incriminate her. Given all of those facts,

Your Honor, it is not in the furtherance of the administration of justice at this time to grant immunity to Miss Batt.

THE COURT: Let me just ask all counsel if the fact that a witness chooses to take the Fifth Amendment on the advice of counsel leads to no inference one way or the other.

MR. WALINSKI:

Decidedly not the law. The constitution of Ohio expressly provides the opposite. Article I, Section 10, says that when a person refuses to testify, that person may not be compelled to testify. But the refusal to testify may be considered by the jury and commented on by counsel.

THE COURT: Could I see the constitutional section, please?

MR. WALINSKI: Article I, Section 10. Your Honor, I can give you a --

THE COURT: I'd like to see the section, please.

MR. WALINSKI: Okay.

MR. ANDERSON: Your Honor, it would be our position that that wouldn't even apply either in that the U.S. Constitution Fifth Amendment would supersede the Ohio constitution in regards to that. That person has a right by virtue of the federal laws not to take the witness stand and not to have any inference drawn on her refusal to testify.

THE COURT: I thought we were talking also at one point about a limiting instruction if this defendant were unavailable and the idea being that inferences are not drawn from people exercising constitutional rights on the advice of counsel.

MR. WALINSKI: The Supreme Court of Ohio or the Supreme Court of the United States has never applied the Fifth Amendment to

mere witnesses. In fact the Supreme Court has said that the opposite is true, that the common law rule -- the common law rule is that the inference may be commented upon and considered. Here's the test of the last sentence of the Ohio constitution (indicating).

MR. ANDERSON: Your Honor, if we want to even develop the testimony in this case --

MR. WALINSKI: Let the Judge read it. That constitution has been limited. That has been limited as it applies to the refusal by the accused. The refusal by a mere witness has never been -- that section of the constitution has not been superseded by the federal constitution with respect to mere witnesses.

THE COURT: All right. But you're talking about the potential of a subsequent prosecution of Miss Batt, and we're talking about her constitutional rights in the

future and her right against self-incrimination in any future prosecution. I'm assuming if you were representing Miss Batt you would argue strenuously the fact that she exercised her constitutional rights not to testify should not be considered as evidence against her.

MR. WALINSKI: Of course.

Absolutely. The federal constitution prohibits that.

MR. ANDERSON: I believe Mr. Zaner will even proffer that she'll deny any culpability here. In fact, he says she only asserted the Fifth Amendment of privilege based upon the advice of counsel.

THE COURT: That's my concern here. That's exactly my concern here.

MR. WALINSKI: Well, we have the Ohio constitution that is a more paramount concern. The federal constitution applies to an accused in a criminal case, period.

THE COURT: My concern here is this trial with the defendant, Matthew Reiner,his rights and the right of the State of Ohio to have a fair trial. Jeopardy has attached. Mr. Reiner is the individual on trial here. His rights must be protected, but so must the State's rights to have the witnesses called and according to statute. There is the possibility that this witness may testify.

MR. WALINSKI: Well, Your Honor, you asked a different question. You asked --

THE COURT: I know. I know. Let's get back on track. I'm trying to look at this particular situation, this trial with this defendant. We're not talking about anything else right now.

MR. WALINSKI: But your question was whether can that fact of her refusal to testify get to the jury. It is the defendant's

right that it gets to the jury under Article I, Section 10.

THE COURT: All right. Well, we're talking about two different things here.

MR. THACKER: My understanding what is being transacted here is transactional immunity.

THE COURT: That's the only thing the statute provides.

MR. THACKER: That's correct.

After they grant her transactional immunity, they can never prosecute her for the death of Alex. They can never prosecute her for the abuse of Alex prior to his death. They can never prosecute her for the abuse of his sibbling, Derek, all of which there will be evidence about during the course of this case.

It is not in the furtherance of the administration of justice to shield her from further prosecution. It's not in the interest

of the State of Ohio. It's not in the interest of Debbie Reiner. Miss Wagner is here to speak as guardian ad litem about the grant of immunity. It's not in the interest of anyone to shield this woman from prosecution when the evidence will establish that after she had she entered this home this pattern of abuse began and that prior to her entry into this home there was no abuse.

It is simply not in the interest of anyone to grant her immunity from prosecution.

MR. ANDERSON: He switches the language around, and both he and Mr. Walinski are improperly arguing the statute. If they could address properly -- I don't think they can -- it's not a matter of proving we have to show this is in the interest of justice. They have to show that's it's not -- does not affect the interest of justice.

MR. THACKER: But's it's not the furtherance of the administration of justice. The standard's the same.

MR. ANDERSON: Clearly if they have evidence that would indicate that someone else committed this crime, I think they were under an obligation or duty to present it to our office well before this period of time. They're merely at this point in time trying to present evidence to obtain acquittal with this defendant. But they had that obligation pursuant to the ethical requirements of under Ohio law to have presented that information to us, and they haven't.

And the mere fact that she was also in the home, they have offered no shred of evidence other than she is present there which clearly is insufficient to obtain a conviction. They have her convicted before she even has her trial.

MR. THACKER: Judge, I'm not trying convict anyone.

THE COURT: Let me ask if the State of Ohio presently intends to prosecute this witness.

MR. ANDERSON: No. We -- I don't believe that there is evidence for a grand jury to return an indictment.

THE COURT: All right.

MS. WAGNER: May I be heard on behalf of the children?

THE COURT: All right. Will you add anything to this discussion?

MS. WAGNER: I think I would,
yes.

THE COURT: Briefly.

MS. WAGNER: Thank you, Your Honor. I've been representing the minor children of Matthew and Debbie Reiner over a year now. I've been present at all of the juvenile hearings at which point extensive

medical evidence has been presented. In terms of not furthering the administration of justice, my clients whose brother was killed have an interest in having the killer of their brother brought to trial. These young children are going to have to live with this for the rest of their lives.

I won't go on about the proceedings in juvenile court. I would like to mention, however, contrary to Mr. Anderson's comments, there is a plethora of evidence on the record in juvenile court besides the timing which points to Susan Batt.

In addtion, the medical evidence that was presented there, the medical literature, the red flags of child abuse which were present in Miss Batt, once I think the Court really needs to listen to all the evidence before this is granted, and it will be evident at that point that it was a comedy of errors and incompetence which resulted in Mr.

Reiner being on trial. And it's the children's position that they would like to see the true killer of their brother presented and brought to justice, and that will not happen if Miss Batt is granted immunity.

THE COURT: Mr. Anderson.

MR. ANDERSON: Your Honor, I have not been provided any of those documentations that she's saying provides any evidence. And she was under the same ethical obligation. It appears to me that she's not necessarily just strictly representing the interest of the children, that she's in fact made up her mind as in regards to the guilt of innocense of Matthew Reiner. That's what we're here to do, not this attorney.

It's clear to me that the tactic that they've chosen to take in trial is to try to paint Susan Batt as the person who did this crime, have her take the Fifth Amendment and comment upon her failure to take the stand in

effort to try to get acquittal. And it's the State's position that jurors should be provided with all the relevant testimony in order that they can make a fair and impartial decision.

THE COURT: This Court also did independent research of what immunity and the interest of justice were. This witness has chosen to take the Fifth on the advice of counsel. The prosecutor has made a statement that she is not -- there is no intention to prosecute her in the future.

This defendant is now on trial. There was an indictment, and he is presumed innocent unless and until the State provides evidence beyond a reasonable doubt of his guilt. The State has the obligation and one chance only, because jeopardy has attached, to present all of its evidence.

It is in the interests of justice to make available for this trial the testimony of one familiar with facts surrounding and

preceding the incident.

The decision to grant immunity is one which this Court must make. Hypothetically, if there was a prosecution in the future, it it would seem to me that this case -- if there were acquittal, if this case -- testimony of this case may in fact be used in any defense of a future prosecution.

And reasonable doubt, even assuming we had an indictment here, reasonable doubt of what occurred may be a feature in the second case. But what I'm looking at now are the interests of this trial, this defendant and this prosecution.

And I'm finding that under the statute that the interests of justice would be served to have the witness testify subject to full cross-examination and penalty for perjury if she lies on the stand.

MR. THACKER: Your Honor, may I

just point out one thing? This is transactional immunity which they are granting her or which you are allowing them to grant. There won't be a second trial. She will -- she cannot be prosecuted because they are granting her immunity for anything that she may have done to these children.

THE COURT: Is that the decision of the State? I mean, is that what the State is a saying at this time?

MR. ANDERSON: Your Honor, Your Honor -- Your Honor, we have been provided with no information to where we would have sufficient evidence to take to the grand jury. We're relying on the coroner's testimony that we have that she's excluded as being a potential defendant. We are -- so we would have to contradict our coroner in regards to that matter. We are requesting this Court to grant immunity to this person based upon our

need for her testimony.

I think Mr. Thacker misplaces or misstates what we are asking. We're not granting her immunity. We're asking the Court to do it because we feel that it will further the interest of justice and enable the jury to get all the evidence it needs to make a fair and impartial decision.

MR. THACKER: The point is this is not use immunity they are granting her. They are granting her transactional immunity by issuing this order.

THE COURT: That is by statute, and it is under the decisions of the laws of this state. That's correct.

MR. THACKER: I just wanted to point out the Court had referred it in -- when you made your statement that referred to a second trial, there won't be a second trial.

THE COURT: I understand. I understand. All right. Let's go forward.

Bring in the witness, please.

MR. ANDERSON: Your Honor, we had basically -- have medical doctors that we have promised that we would get on here. So we are going to calla her later. We wanted to address the issue.

MR. ZANER: We appreciate it, Your Honor.

MR. ANDERSON: Just so, we're going to call her later, and we'll just inform her that she's still subject to the subpoena and has to be here.

MR. WALINSKI: Your Honor, could we have an order exemptin for purposes of this witness Debbie Reiner from the exclusion? Could she sit in?

MR. ANDERSON: We're not going to do examination of Susan Batt right now.

MR. WALINSKI: Excuse

me. When you come to Susan Batt. I'm sorry. I wasn't listening.

MR. ANDERSON: We'd object to it.

THE COURT: The objection is going to be sustained.

MR. ZANER: Your Honor, for the record on behalf of Miss Batt, we're asking that the TV not audio nor video her testimony.

THE COURT: All right. Do we have an audio? Let's turn that off, please.

CAMERA OPERATOR: The camera has been turned off.

THE COURT: What about the audio, please.

CAMERA OPERATOR: If you want that off.

MR. ROBERT KAPLAN: For the record, Your Honor, I have my voice back this morning. You'd want to know that. All of it.

THE COURT: Mr. Anderson.

Mr. Anderson.

MR. ANDERSON: Your Honor, based upon our written request, we would request the Court to grant this witness community pursuant to 2945.44 and compel her to testify in this matter.

THE COURT: All right. Miss Batt, we're going to be telling you that under the law of Ohio now, even though you have taken the Fifth Amendment pursuant to what your attorney has told you, I am under Revised Code 2945.44 informing that that you will receive immunity.

If you would have been allowed to not give an answer or give any information because of your Fifth Amendment right, I'm now going to compel you to answer, and you will not be prosecuted or subjected to any criminal penalty in this case for or on account of any transaction or manner concerned for which in compliance with my order you gave an answer or produced any information.

In other words, your truthful testimony now must be given. Under this law you are subjected to a criminal penalty if you would lie on the stand. And you will remain under oath, and you will remain under subpoena until you are called. Do you understand?

SUSAN BATT: Yes.

THE COURT: Is that sufficient?

MR. ANDERSON: Yes, it is, Your Honor.

THE COURT: All right. Then we will allow Miss Batt to step down until she is called at a later time. You do not discuss the case with anyone. You understand that?

SUSAN BATT: Uh-huh.

THE COURT: All right.

MR. ROBERT KAPLAN: Judge, I didn't hear the last.

THE COURT: I told her not to discuss the case with anyone.

MR. ROBERT KAPLAN: Either us or the prosecutors.

THE COURT: She understands?

SUSAN BATT: Uh-huh.

MR. ROBERT KAPLAN: Good. Thank you, Judge.

THE COURT: The witness can be excused. We are ready to bring in the jury now?

MR. ANDERSON: Yes.

Supreme Court, U.S.
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No. 00-1028

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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Respondent, Matthew Reiner, respectfully submits this Brief in Opposition to the Petition for Certiorari of Petitioner, The State of Ohio.

JURISDICTION

The Court lacks jurisdiction to decide the question presented because the judgment below, from which petitioner seeks to derive that question, in truth reflects only the Ohio Supreme Court's final, binding interpretation of a state statute. No controlling federal question is presented, and therefore there is "nothing for the Court to do." *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); 28 U.S.C. § 1257.

REASONS FOR DENYING THE WRIT

The Petition presents only an issue of state law: the meaning and application of the Ohio statute authorizing the grant, by a state court, of immunity to a witness in a state-court proceeding. Ohio Rev. Code Sec. 2945.44. Petitioner seeks review of the Ohio Supreme Court's dispositive interpretation of that statute. But, under time-honored constitutional precepts, that interpretation is not subject to this Court's review, nor should it be. The Ohio Supreme Court's decision, announced in a 6-1 decision,[1] is the

1. Petitioner falsely states that a 5-2 majority of the Ohio Supreme Court announced the ruling regarding the state immunity statute. *See* Pet. at 6. Although the case produced four opinions, the immunity decision was by a 6-1 vote. *See* App. at 18-25 (majority opinion, Lundberg Stratton, J, with Wolff, Sweeney and Pfeifer, JJ., concurring); 28 (Douglas, J, "specifically concur[ring] in the majority's opinion with regard to the immunity issue"), and 29 (Moyer, C.J., "concur[ring] in the decision of the majority with respect to the grant of immunity"). Only Justice Cook dissented from the immunity ruling.

authoritative interpretation of the statute *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

The Petition itself makes this clear. The Statement of the Case ends with a simple declaration: "Petitioner now seeks this Court's review of the Ohio Supreme Court's decision *as to the immunity question*." Pet. at 7 (emphasis supplied). "The immunity question," of course, is a question that arises entirely under state law. It is defined only by state statute, interpreted only by state courts, and applicable only to state-court proceedings. As Petitioner concedes, the decision below "affects court proceedings only in Ohio." Pet. at 9.

Likewise, the State's sole interest in the matter at hand is in the application of the state statute to state-court prosecutions. The State has an undoubted interest in knowing the circumstances under which an Ohio court is empowered by state statute to grant immunity to a witness in a state-court criminal proceeding. But the answer to that legal question arises entirely from the statute, and from the Ohio Supreme Court's final, "authoritative interpretation" of it.

The State displays the true focus of its concern in this case in the section of the Petition titled Reason to Grant the Writ, and that focus is plainly on state-law issues. Here, the State advances two core claims: *first*, that the Ohio Supreme Court improperly concluded that Respondent had standing to challenge the grant of immunity under the state statute (Pet. at 12); and *second*, that the Ohio Supreme Court used the wrong standard of review on appeal (Pet. at 21). Both of these issues are questions solely of state law, as this Court's precedents clearly show. *See, e.g., Asarco, Inc. v. Kadish*,

490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability); *Cooper v. State of California*, 386 U.S. 58, 62 (1967) (state law standard of appellate review for state-law question presents no federal question).

Within this obvious state-law focus, Petitioner conjures a federal issue in this matter only by championing the Fifth Amendment rights of non-party witnesses, advancing the claim — peculiar coming from the State — that witnesses enjoy a much broader Fifth Amendment privilege against compelled self-incrimination than the Ohio Supreme Court has recognized — at least in this singular case. Petitioner concedes that this advocacy posture may be "unusual." Pet. at 1. But, in truth, the proper term for this contortion is "ineffective."

The barriers to jurisdiction are not only substantial, they are numerous. First, this Court's precedents have long since established the sensible, indeed indispensable, rule of federalism that, even where a state court's declaration of state law implicates or is affected by its understanding of federal law, that is not itself sufficient to create jurisdiction in this Court. This is not a case like *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977), in which the state supreme court reached its interpretation of state law because it "felt compelled [to do so] by what it understood to be federal constitutional considerations." Nor is this a case in which the Ohio court's state-law decision has obstructed the exercise of a federal right. As has long been held, even when a state court decision directly affects federal constitutional rights, the state court's declaration "should

bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (upholding Illinois Supreme Court's interpretation of state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights). If the Ohio court's ruling does affect the exercise of the Fifth Amendment privilege, it does so, not by obstructing that right, but merely by narrowing the circumstances in which a witness's assertion of the right entitles him to a grant of immunity.

Moreover, even if the decision below could somehow be construed as constraining the assertion of a Fifth Amendment right, the decision would be reviewable by this Court only in response to a claim by the party asserting the right. The State of Ohio is not that party.

In any event, this case raises no substantial federal question. The Ohio Supreme Court's discussion of Fifth Amendment rights was merely part of its analysis of the governing state statute. That discussion is clear, and entirely rooted in long-settled principles, announced and faithfully applied by this Court and by the Ohio Supreme Court. *See* App. at 18-25 (reviewing and applying precedents). And the Ohio Supreme Court's ultimate declaration of law is clear, fair, and reasonable, fully supported by the existing precedents.

The decision below in no way departs from settled law. It does not conflict with decisions of this Court; rather it follows them. *See, e.g.*, App. at 18-19, citing and following *United States v. Apfelbaum*, 445 U.S. 115 (1980) and *Hoffman v. United States*, 341 U.S. 479 (1951). It does not conflict with decisions of other state courts of last resort, or

of federal appellate courts. The meaning and application of Ohio's immunity statute is exclusively a state matter. That Ohio's state-court immunity law may differ from that of the federal system, or of other state systems, is of no moment within a federalist system. Thus, Petitioner's claim of "conflict" in this regard is senseless. *See* Pet. at 9-10 & n.5 and cases cited.

Finally, the Petition makes clear that, whatever its elements, the decision below involves the application of settled law, properly identified and explicated, to intricate and highly idiosyncratic facts. Even if Petitioner could demonstrate a misapplication of that law — which it cannot — certiorari would not be warranted. *See* Supreme Court Rule 10.

There is no ground for this Court's jurisdiction. The writ should not issue.

I.

THE DECISION BELOW IS AN AUTHORITATIVE DECLARATION OF STATE LAW.

The Ohio Supreme Court ruled, 6-1, that the state trial court violated state law by granting a witness transactional immunity in violation of Ohio. Rev. Code Sec. 2945.44. The statute sets forth a process by which a state trial court "in any criminal proceeding in this state" may compel a witness to answer a question or produce information. *See* Pet. at 3 n.2 (quoting statute). Although the statute is clear in its terms, the exact process for determining its application in a particular instance is not expressly stated. In the decision below, the Ohio Supreme Court explicated

the statute, and defined the proper procedure by which a trial court is to determine whether the necessary predicates of the statute are met in a particular instance.

This is the distilled essence of what state supreme courts do: they define state law. And when they perform that essential function, their declarations are final, binding, and non-reviewable. "[A] State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

The decision below makes clear that the Ohio Supreme Court was declaring state law. The relevant section begins with a statement and discussion of the statute, App. at 19-20. It then articulates, for the first time, the essential benchmarks of the statutory process. As authoritatively interpreted by the Ohio Supreme Court, the statute requires the trial court to make certain essential findings. App. at 22-23 ("A court may resort to [Ohio Rev. Code Sec.] 2945.44 only after reaching the threshold determination that the witness's testimony would be self-incriminating"). The Ohio Supreme Court concluded that the trial court had failed to make these required determinations. App. at 23 ("Here the trial court failed to make that determination"). This conclusion produced a clear holding of state law: "Therefore, we find that a court has no judicial discretion to grant or deny immunity until and unless the statutory requirements for immunity are met." App. at 25. Accordingly, the Ohio Supreme Court reversed the trial court's judgment because that court had failed to adhere to state law, as the Ohio Supreme Court authoritatively interpreted it.

The Ohio Supreme Court's decision is purely one of state law. Under this Court's settled precedents, there is no basis for jurisdiction.

II.

THE OHIO SUPREME COURT'S STATEMENTS OF FIFTH AMENDMENT LAW ARE ACCURATE.

As construed by the Ohio Supreme Court, the state immunity statute involves a subsidiary inquiry as to whether the witness has a valid claim of privilege against self-incrimination. The state supreme court has full authority to structure that inquiry as it chooses. Here, the Ohio Supreme Court mandated an actual inquiry by the trial court into whether "the witness's testimony would be self-incriminating." App. at 22-23. To illuminate the contours of the inquiry, the Ohio Supreme Court explicated the settled law of Fifth Amendment privilege. In doing so, the Ohio Supreme Court looked to its own settled precedents, and those of this Court. Its statements of these rules of law are entirely accurate, and the rules themselves are sound. Indeed, Petitioner opposed certiorari in this Court in precisely the cases cited by and relied upon in the decision below. *See Jenkins v. Ohio*, 472 U.S. 1032 (1985) (denying certiorari); *Kirk v. Ohio*, 516 U.S. 1097 (1996) (same).

The statements regarding the Fifth Amendment that appear in the decision below square entirely with this Court's precedents:

- The Fifth Amendment privilege is not unlimited.
- A witness may assert a Fifth Amendment right "only when the danger of incrimination is real and appreciable.
- When a witness asserts a privilege against self-incrimination, a court may not rely upon a witness's claim alone.

- If a court determines that a Fifth Amendment assertion is invalid, it may require the witness to answer the question.

See, e.g., *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination").

Petitioner is wholly unable to identify a single erroneous statement of law in the decision below. Rather, Petitioner scurries back to 1807, to a case in which Chief Justice Marshall, presiding over the trial of Aaron Burr, discussed certain nuances of the privilege against self-incrimination. But even after this inventive time-travel, Petitioner fails to explain how the Ohio Supreme Court misstated prevailing law.

The decision below discusses federal constitutional law in the course of explicating the process required by a state statute. For reasons set forth above, the explication of the process is authoritative and not subject to review here. And the ancillary discussion of federal constitutional law is itself entirely correct. It squares with this Court's precedents, and those of the lower federal courts and of state courts of last resort. Nothing in the Ohio Supreme Court's discussion of federal constitutional law warrants this Court's review.[2]

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2. As noted above, even if Petitioner could show that the decision below changes or eviscerates the federal constitutional right — which it plainly cannot — the State of Ohio would have absolutely no standing to raise the point. The State's right that is at stake here is solely its right under state law to obtain testimony from a properly immunized witness, *if* the requirements of the state statute are met.

III.

THE OHIO SUPREME COURT'S DECISION REGARDING THE OHIO STATUTE HAS NO EFFECT ANYWHERE EXCEPT OHIO, AND DOES NOT ADVERSELY AFFECT OHIO PROSECUTIONS.

According to Petitioner, far more people are entitled to assert the Fifth Amendment, and decline to answer questions posed by the State in criminal prosecutions, than the Ohio Supreme Court allows. And, Petitioner argues, unless this problem is corrected, prosecutions will be "stymied." The former is an interesting proposition, coming from the Sate of Ohio. But whatever its merits as an official state policy position, it is wrong. And the horrible prospect asserted in the second prong of this argument is entirely imaginary.

First, Petitioner acknowledges that the decision below applies only in Ohio. Thus its insinuation of broader consequences is unavailing. The Ohio Supreme Court's decision about how a state statute operates can, by definition, affect only Ohio prosecutions.

More fundamentally, the decision below in no way undermines the State's ability to prosecute. Ohio law provides simple, alternative processes by which the testimony of reluctant witnesses can be adduced. If, as the Ohio Supreme Court ruled was the case here, the reluctant witness does *not* have a valid claim of Fifth Amendment privilege, yet declines to testify, Ohio law affords an obvious, lawful method for compelling the testimony: the power of contempt. *See* Ohio Rev. Code Sec. 2317.22 and Oh. R. of Crim. Proc. 17(G). If on the other hand the witness does have a valid claim of privilege, then the state

immunity statute provides a proper method of compelling the testimony.

Ohio law, as authoritatively declared by the Ohio Supreme Court, does not frustrate criminal prosecutions. It merely protects *all* parties from the complications that would arise were a recalcitrant witness able to avoid testifying, in the absence of transactional immunity under the Ohio statute, by the simple, unchecked device of claiming a Fifth Amendment privilege, even when the claim is wholly without foundation.

The Ohio Supreme Court's decision is legally correct. It will not threaten future prosecutions, since Ohio law provides ample means of obtaining testimony from reluctant witnesses.

Moreover, as is clear from Petitioner's condensed statement of facts, the decision below arose from a highly intricate and idiosyncratic (indeed, apparently unprecedented) factual setting. In such a circumstance, an exercise of this Court's jurisdiction is not warranted, even if this case were to raise a substantial federal question, which it does not.

CONCLUSION

For the foregoing reasons, the writ should not issue.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-1028

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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Petitioner, the State of Ohio, respectfully submits this Reply to the Brief in Opposition filed by Respondent, Matthew Reiner. Petitioner files this brief under Rule 15.6 of the Rules of this Court.

REASONS TO GRANT THE WRIT

In his Brief in Opposition, Respondent claims that the Ohio Supreme Court's ruling rests solely on an independent and adequate state ground and that the Ohio Supreme Court's decision is consistent with Fifth Amendment law. Petitioner responds to these claims in succession.

I.

THE OHIO SUPREME COURT'S DECISION DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

The thrust of Respondent's Brief in Opposition is that the Ohio Supreme Court's ruling "presents only an issue of state law: the meaning and application of the Ohio statute authorizing the grant, by a state court, of immunity to a witness in a state-court proceeding." Resp. at 1. Respondent supports this position by claiming that Petitioner advances only two basic arguments and that both are exclusively state-law claims. See Resp. at 2:

> Here, the State advances two core claims: *first*, that the Ohio Supreme Court improperly concluded that Respondent had standing to

> challenge the grant of immunity under the state statute (Pet. at 12); and *second*, that the Ohio Supreme Court used the wrong standard of review on appeal (Pet. at 21).

He forgot one. Petitioner also claimed that the Ohio Supreme Court's ruling all but required witnesses first to prove the very hazard against self-incrimination from which they sought protection.[1] As reflected by the Ohio Supreme Court's own comments, this constituted an unprecedented narrowing of a witness's Fifth Amendment privilege: "Because Susan Batt did not have a valid Fifth Amendment privilege, the trial court's grant of immunity was erroneous and unlawful." App. at 25. It is clear from these statements that the Ohio Supreme Court based its decision on the Fifth Amendment to the United States Constitution.

Until this Court decided *Michigan v. Long* (1983), 463 U.S. 1032, there was no uniform, predictable manner in which to determine whether a given case rested on adequate and independent state grounds:

> Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.

463 U.S. at 1038 (footnote omitted).

Long ended this state of flux and announced the "plain-

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[1]Pet. at 20.

statement rule,"[2] under which this Court can now review a case even absent the exclusive, direct application of federal law:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-1041. As *Long* observed, if a state court wanted to base its ruling exclusively on state-law grounds, it need only have done so in its opinion. 463 U.S. at 1041.

Subsequently, *Pennsylvania v. Muniz* (1990), 496 U.S. 582, applied this liberal standard in the very context of the privilege against self-incrimination. Although the Pennsylvania state appellate court premised its ruling entirely on a provision of that state's constitution, this Court nonetheless granted certiorari because the state court interweaved the matter with federal law by explaining that the state constitutional provision "'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.'" 496 U.S. at 588, n.4. "The decision therefore does not rest on an independent and adequate state ground." *Id.*, citing *Long*.

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[2]463 U.S. at 1041.

The cases on which Respondent relies either predate *Long* or are inapposite. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190 (1925); *Cooper v. California*, 386 U.S. 58 (1967); and *Gurley v. Rhoden*, 421 U.S. 200 (1975), for instance, predate *Long* and *Muniz*. And *Asarco, Inc. v. Kadish*, 290 U.S. 605 (1989), undercuts, rather than bolsters, Respondent's position because it, as is the Ohio Supreme Court's ruling, was based entirely on federal grounds.

Here, similarly, the Fifth Amendment to United States Constitution is involved because the Ohio Supreme Court premised its ruling exclusively on it. See App. at 25: "Because Susan Batt did not have a valid Fifth Amendment privilege, the trial court's grant of immunity was erroneous and unlawful." In fact, before filing this brief in opposition, Respondent had consistently relied on the Fifth Amendment. See App. at 18:

> Defendant's cross-appeal challenges the validity of the trial court's grant of immunity to Susan Batt. The defendant alleges that the grant of transactional immunity pursuant to R.C. 2945.44 was unlawful because Susan Batt did not have a valid Fifth Amendment privilege against self-incrimination upon which to base the immunity. Defendant claims that, as a consequence, his rights were prejudiced. We agree.
>
> The Fifth Amendment declares that 'no person ... shall be compelled in any criminal case to be a witness against himself ... .'

Respondent is now entirely avoiding any mention of

the Fifth Amendment. This eleventh-hour about-face should be rejected. Accordingly, the Ohio Supreme Court's ruling does not rest on independent and adequate state grounds.

II.

THE OHIO SUPREME COURT'S APPLICATION OF FIFTH AMENDMENT LAW IS ALTOGETHER INACCURATE.

The Fifth Amendment privilege against self-incrimination is broad and attaches not only where the question calls for the admission of a crime or where it asks the witness to provide a link in the chain of evidence needed to prosecute. Rather, the privilege attaches even if a question calls for an answer that ***can*** be self-incriminating:

> A witness risks a real danger of prosecution if an answer to a question, on its face, calls for the admission of a crime or requires that the witness supply evidence of a necessary element of a crime or furnishes a link in the chain of evidence needed to prosecute. In *Hoffman*, the Supreme Court held that a real danger of prosecution also exists where questions, ***which appear on their face to call only for innocent answers***, are dangerous in light of other facts already developed. In such a situation a witness bears no further burden of establishing a reasonable cause to fear prosecution beyond asserting the privilege and identifying the nature of the criminal charge or supplying sufficient facts so that a particular criminal charge can reasonably be

> identified by the court. The witness has met his burden and the court does not need to inquire further as to the validity of the assertion of the privilege, if it is evident from the implications of a question, in the setting in which it is asked, that a responsive answer ***might*** be dangerous to the witness because an injurious disclosure ***could*** result.

In Re: Morganroth v. Fitzsimmons, 718 F.2d 161, 167 (6th Cir. 1983) (emphasis added), citing *Hoffman v. United States*, 341 U.S. 479 (1951).

Respondent acknowledges this wide scope of protection: "A witness may assert a Fifth Amendment right '[*sic*] only when the danger of incrimination is real and appreciable." Resp. at 7. But he wrongly claims that the Ohio Supreme Court followed this liberal approach. Instead, that tribunal expressly ruled that Ohio's immunity statute applied only upon a showing that "the witness's testimony ***would be*** self-incriminating." App. at 22-23 (emphasis added). To be sure, from Chief Justice Marshall's opinion in *United States v. Burr*, 25 F.Cas. 38 (Cir. Ct., D. Va. 1807) to present, a witness cannot invoke the privilege absolutely. The court must be assured of a proper basis for the claim, but in determining the proper basis, no court has ever required the witness personally to disclose the information which the privilege exists to protect. If such were ever done, the privilege would no longer exist. That is why an inquiry into the existence of the privilege has always been limited to the scope of the questions and the setting and context in which they are asked.

The proper state of the law is that the privilege attaches upon the showing that, "in light of other facts already developed,"[3] the witness's testimony ***could be*** self-incriminating, *i.e.*, that, "in the setting in which [the question] is asked, that a responsive answer ***might*** be dangerous to the witness because an injurious disclosure ***could*** result."[4] What Respondent might blithely dismiss as a semantic lapse is, instead, the fatal flaw in the Ohio Supreme Court's ruling that compels this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] *Morganroth*, 718 F.2d at 167 (emphasis added), citing *Hoffman*.

[4] *Id.* (emphasis added).

Per Curiam

SUPREME COURT OF THE UNITED STATES

OHIO *v.* MATTHEW REINER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 00–1028. Decided March 19, 2001

PER CURIAM.

The Supreme Court of Ohio here held that a witness who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination. Because our precedents dictate that the privilege protects the innocent as well as the guilty, and that the facts here are sufficient to sustain a claim of privilege, we grant the petition for certiorari and reverse.

Respondent was charged with involuntary manslaughter in connection with the death of his 2-month-old son Alex. The coroner testified at trial that Alex died from "shaken baby syndrome," the result of child abuse. He estimated that Alex's injury most likely occurred minutes before the child stopped breathing. Alex died two days later when he was removed from life support. Evidence produced at trial revealed that Alex had a broken rib and a broken leg at the time of his death. His twin brother Derek, who was also examined, had several broken ribs. Respondent had been alone with Alex for half an hour immediately before Alex stopped breathing. Respondent's experts testified that Alex could have been injured several hours before his respiratory arrest. Alex was in the care of the family's babysitter, Susan Batt, at that time. Batt had cared for the children during the day for about two weeks prior to Alex's death. The defense theory was that Batt, not respondent, was the culpable party.

Batt informed the court in advance of testifying that she intended to assert her Fifth Amendment privilege. At the State's request, the trial court granted her transactional

immunity from prosecution pursuant to Ohio Rev. Code Ann. §2945.44 (1999). She then testified to the jury that she had refused to testify without a grant of immunity on the advice of counsel, although she had done nothing wrong. Batt denied any involvement in Alex's death. She testified that she had never shaken Alex or his brother at any time, specifically on the day Alex suffered respiratory arrest. She said she was unaware of and had nothing to do with the other injuries to both children. The jury found respondent guilty of involuntary manslaughter, and he appealed.

The Court of Appeals of Ohio, Sixth District, reversed respondent's conviction on grounds not relevant to our decision here. The Supreme Court of Ohio affirmed the reversal, on the alternative ground that Batt had no valid Fifth Amendment privilege and that the trial court's grant of immunity under §2945.44 was therefore unlawful.* 89 Ohio St. 3d 342, 358, 731 N. E. 2d 662, 677 (2000). The court found that the wrongful grant of immunity prejudiced respondent, because it effectively told the jury that Batt did not cause Alex's injuries.

The court recognized that the privilege against self-incrimination applies where a witness' answers "could reasonably 'furnish a link in the chain of evidence'" against him, *id.*, at 352, 731 N. E. 2d, at 673, quoting *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). *Hoffman*, it noted, requires the trial court to determine

*Ohio Rev. Code Ann. §2945.44 (1999) states in pertinent part: "In any criminal proceeding . . . if a witness refuses to answer or produce information *on the basis of his privilege against self-incrimination*, the court of common pleas . . . unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if . . . [the prosecuting attorney so requests and] . . . [t]he court . . . informs the witness that by answering, or producing the information he will receive [transactional] immunity . . . ." (Emphasis added.)

whether the witness has correctly asserted the privilege, and to order the witness to answer questions if the witness is mistaken about the danger of incrimination. *Ibid.* The court faulted the trial judge for failing to question sufficiently Batt's assertion of the privilege. It noted that the Court of Appeals, in finding a valid privilege, failed to consider the prosecutor's suggestion that Batt's testimony would not incriminate her, and Batt's denial of involvement in Alex's abuse when questioned by the Children's Services Board. The court held that "Susan Batt's [trial] testimony did not incriminate her, because she denied *any* involvement in the abuse. Thus, she did not have a valid Fifth Amendment privilege." 89 Ohio St. 3d, at 355, 731 N. E. 2d, at 675 (emphasis in original). The court emphasized that the defense's theory of Batt's guilt was not grounds for a grant of immunity, "when the witness continues to deny any self-incriminating conduct." *Ibid.*

The Supreme Court of Ohio's decision that Batt was wrongly granted immunity under §2945.44 (and consequently, that reversal of respondent's conviction was required) rested on the court's determination that Batt did not have a valid Fifth Amendment privilege. In discussing the contours of that privilege, the court relied on our precedents. We have observed that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984). The decision at issue "fairly appears . . . to be interwoven with federal law," and no adequate and independent state ground is clear from the face of the opinion. *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983). We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law. See *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 816 (1986) ("[T]his Court retains power to review the decision of

a federal issue in a state cause of action."): *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281, 293–294 (1908).

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. As the Supreme Court of Ohio acknowledged, this privilege extends not only "to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman*, 341 U. S., at 486. "[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.*, at 486–487.

We have held that the privilege's protection extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer." *Id.*, at 486. That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. *Ibid.* A danger of "imaginary and unsubstantial character" will not suffice. *Mason* v. *United States*, 244 U. S. 362, 366 (1917). But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's "basic functions . . . is to protect *innocent* men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Grunewald* v. *United States*, 353 U. S. 391, 421 (1957) (quoting *Slochower* v. *Board of Higher Ed. of New York City*, 350 U. S. 551, 557–558 (1956)) (emphasis in original). In *Grunewald*, we recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth. 353 U. S., at 421–422.

The Supreme Court of Ohio's determination that Batt

did not have a valid Fifth Amendment privilege because she denied any involvement in the abuse of the children clearly conflicts with *Hoffman* and *Grunewald*. Batt had "reasonable cause" to apprehend danger from her answers if questioned at respondent's trial. *Hoffman*, *supra*, at 486. Batt spent extended periods of time alone with Alex and his brother in the weeks immediately preceding discovery of their injuries. She was with Alex within the potential timeframe of the fatal trauma. The defense's theory of the case was that Batt, not respondent, was responsible for Alex's death and his brother's uncharged injuries. In this setting, it was reasonable for Batt to fear that answers to possible questions might tend to incriminate her. Batt therefore had a valid Fifth Amendment privilege against self-incrimination.

We do not, of course, address the question whether immunity from suit under §2945.44 was appropriate. Because the Supreme Court of Ohio mistakenly held that the witness' assertion of innocence deprived her of her Fifth Amendment privilege against self-incrimination, the petition for a writ of certiorari is granted, the court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.